



**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 399 OF 2014**

**STEPHEN KAMAU KARANJA**

**1<sup>ST</sup> CLAIMANT**

**NICHOLAS KARUGIA NG'ANG'IRA**

**2<sup>ND</sup> CLAIMANT**

**v**

**FAMILY BANK LTD**

**RESPONDENT**

**RULING**

1. Stephen Kamau Karanja (1<sup>st</sup> Claimant) was employed by Family Bank Ltd (Respondent) as Operations Officer with effect from 3 September 2007 while Nicholas Karugia Ng'ang'ira (2<sup>nd</sup> Claimant) was employed on 12 May 2008.
2. On 21 August 2010, both Claimants were suspended from work pending investigations into allegations of fraud and theft. The Claimants were subsequently charged before Nakuru Chief Magistrate's Court Criminal Case No. 4309 of 2010. On 20 December 2013, both Claimants were acquitted.
3. But in the meantime, the Respondent had through letters dated 10 September 2010 summarily dismissed the Claimants.
4. The Claimants being dissatisfied with the dismissals instituted legal proceedings against the Respondent jointly on 5 September 2014.
5. The Respondent was served and on 26 September 2014, it filed a Response. In paragraph 3 of the Response it was pleaded that

*3. The Respondent shall before the hearing of this suit raise a preliminary objection on a point of law that this suit is statutorily time barred and should therefore be struck out, notice of which is hereby given.*

6. On 6 October 2014, the Court directed that the preliminary objection be taken first and both parties being ready the parties made submissions.

**Respondent's submissions**

7. The Respondent submitted that the Cause was statute barred because the Claimants pleaded that they were dismissed on 10 September 2010 and that by dint of section 90 of the Employment Act, 2007 the proceedings should have been commenced within 3 years, that is by 10 September 2013. According to the Respondent, the Cause was filed one year after expiry of time and that this was not a case of a continuing injury.
8. The Respondent cited Nakuru Cause No. 334 of 2013, *Francis Somoni Kamasia v Unilever Tea Kenya Ltd.*

## Claimants' submissions

9. The Claimants submitted that the Cause concerned a continuing injury and the Memorandum of Claim was instituted within one year of the acquittal and therefore not time barred by virtue of section 90 of the Employment Act, 2007.
10. The Claimants cited *Hesbone Gavunji Mafunya v Kenya Commercial Bank Ltd* (2014) eKLR and *Gladys Amukoya Were v Mumias Sugar Co.* (2014) eKLR.

## Evaluation

11. It is not in dispute that the Claimants were dismissed on 10 September 2010. It is also not in dispute that the Claimants were charged before Nakuru Chief Magistrate's Court Criminal Case No. 4309 of 2010, with various offences of fraud and were all acquitted on 20 December 2013. Further, it is common that the Cause was filed on 5 September 2014.
12. Section 90 of the Employment Act, 2007 which provides for limitation is to the effect that

***Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or 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.***

13. The Respondent relies on the first part of the section as bolded while the Claimants take umbrage in the second part of the section, as italicized.
14. In the *Mafunya case*, the Claimant was dismissed on 3 June 2009, but instituted legal proceedings some 3 years and 11 months after the cause of action arose (on 15 May 2013). The Claimant had also been charged with a criminal offence but was acquitted in November 2011.
15. Nduma J, without giving any reasons, held that

*it is clear from the pleadings of the Claimant that the injury complained of by the Claimant was 'continuing injury or damage' within the meaning of section 90 of the Employment Act. This matter is therefore not caught by the doctrine of laches and was filed within time.*

16. In the *Amukoya case*, Wasilwa J opined that

*The Employment Act provides for a mandatory duration of three years to institute an employment dispute. The Applicant was dismissed from her employment on the 8.6.2009, she was subsequently charged in a criminal case...which matter was finally concluded and dismissed on the 26.11.2010. Her employment claim before this court was brought on 24.10.2012. Computing from 8.6.2009 to 24.10.2012, this was long past the three (3) year mandatory timelines set by the Employment Act, which are neither negotiable nor can they be extended by any court for whatever reason.*

*In my judgment dated 6.11.2013, at page 9, I stated, which that the proper time for the Applicant to have filed her suit was by 7.6.2012, counting from 8.6.2009 when she was dismissed. However, under the limb of section 90 of the Employment Act that provides that:-*

***'...or in case of continuing injury or damage, within twelve months next after the cessation thereof.'*** *The continuing injury or damage was in motion during the pendency of the criminal case.*

*To my mind therefore the claimant should have filed her claim within 12 months after the dismissal of the criminal case against her, which was made on the 26.11.2010.*

17. My understanding of the submission by the Claimants is that two authorities have held that where criminal proceedings have been preferred against an employee whose services have been terminated or dismissed, time does not run until the conclusion of the criminal charges and therefore, like in the instant case, I should disallow the preliminary objection.
18. But I am unable to accede to the invitation by the Claimant. And with utmost respect, I do not subscribe to the position taken by my brother the Principal Judge and sister Judge.
19. For one, there is no controversy as to what an injury is. It is the violation of another person's legal right which a remedy is available or has been provided by law. It is an actionable wrong.
20. Sections 41 and 45 of the Employment Act, 2007 provide all employees with the primary rights as far as termination or dismissal is concerned. These are the right to a hearing or procedural fairness before a decision to terminate is taken and the right not to be dismissed without fair and valid reasons.
21. The Claimants have pleaded that their dismissals were *wrongful, unprocedural* and *unfair*. The Claimants as indeed all ordinary employees have a legal right not to be *wrongfully dismissed, unprocedurally dismissed* or *unfairly terminated*. The injuries the Claimants suffered can generally be said to be *wrongful dismissal, or unprocedural dismissal* or *unfair termination*. The injuries were suffered on 10 September 2010.
22. Two, the two decisions have not attempted to define or put contours to what a *continuing injury or damage* is. The Employment Act, 2007 has not defined what a *continuing injury or damage* is.
23. It would be appropriate for me therefore to make reference to other reputable sources. Black's Law Dictionary, ninth edition defines *continuing injury* as

*An injury that is still in the process of being committed - An example is the constant smoke or noise of a factory.*

24. To the examples given, I would add payment of wages below the prescribed minimum rates would be a continuing injury.
25. In my view, once the services of an employee have been *wrongfully, unprocedurally* or *unfairly terminated* or he has been dismissed, he suffers a violation of the rights above mentioned, and the injury becomes a *fait accompli*.
26. The employee can either challenge the termination within 3 years or accept it. The *wrongful, unprocedural* or *unfair termination/dismissal* cannot be deemed to be continuing because of criminal charges. The criminal process cannot and does not restore the employment relationship which has been ended in breach of the law or contract.
27. When the criminal process is engaged, it cannot divest from the fact that the employee has suffered an injury because of the impugned termination. The injury cannot continue in motion because of the pendency of the criminal process. The criminal process has its own momentum, objectives and purposes.
28. Different legal principles apply to the criminal process. An employer cannot without more be stopped from proceeding with disciplinary processes as an employer because of pendency of criminal trial unless there is an express intention to await the outcome of the criminal process.
29. In the same vein, it cannot be that time for purposes of limitation would stop running because an employee has been charged with a criminal offence. If this were the intention, it would have been expressly provided for either in the Limitation of Actions Act or the Employment Act, 2007.

## **Conclusion and Orders**

30. The upshot of the foregoing is that Court finds and holds that the Memorandum of Claim filed in Court on 5 September 2014 is statute barred. The Preliminary objection is upheld and the Court orders that the Memorandum of Claim filed on 5 September 2014 be dismissed with no order as to costs.

**Delivered, dated and signed in open Court in Nakuru on this 7<sup>th</sup> day of November 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimants Ms. Njeri instructed by Njeri Njagua & Co. Advocates

For Respondent Mr. Murimi instructed by Murimi, Ndumia, Mbago & Muchela Advocates