



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 475 of 2012

BENSON MUGO MURAGURI.....CLAIMANT

EAST AFRICA PACKAGING INDUSTRIES LIMITED.....RESPONDENT

RULING

The claim herein was filed by the Claimant **BENSON MUGO MURAGURI** through Onyoni Opini & Gachuba Advocates on 21st March 2012. The issue in dispute is the unlawful dismissal and refusal by the Respondent to pay the Claimant compensation, terminal dues and other entitlements. The Respondent **EAST AFRICAN PACKAGING INDUSTRIES LIMITED** filed its reply to the Memorandum of Claim through Wainaina Ileri & Company Advocates on 14th November 2012. In the Memorandum of Reply the respondents pleads that the claim is time-barred by dint of the provisions of Section 25(1) of the Employment Act 2007.

The Respondent subsequently filed a Notice of Preliminary Objection dated 16th November 2012 on the following points:-

1. **THAT** the claim is time barred and offends the provisions of Section 25(1) of the Employment Act 2007.
2. **THAT** the claim should be dismissed with costs to the Respondent.

The case came up for hearing on 10th December, 2012 when the parties argued the preliminary objection.

Mr. Opini appeared for the Claimant while Mr. Wambua appeared for the respondent. Mr. Wambua sought leave to amend prayer 2 of the preliminary objection to substitute section 25(1) with section 90 of the Employment Act. The application was allowed by consent. He submitted that the claim is time barred under Section 90 of the Employment Act, 2007 which requires employment related claims to be filed within 3 years from the date when the claim accrued. That this is a claim of unlawful dismissal on 12th December 2004 and the claim was filed on 21st March 2012, that is, over 8 years from the date the act complained of occurred. He stated that the Claimant has originally filed CMCC 1089 of 2007 but instead of transferring it to the Industrial Court following the coming into operation of the Employment Act on 2nd June 2008, had the case withdraw. He submitted that this suit having been filed 3 years and 9 months after the Act came into operation also offends Section 90 of the Act. He urged the Court to dismiss the case and relied on **ICCause No.1139 of 2012: JOHN MWANIKI VS G4S SECURITY SERVICES LTD.**

Mr. Opini opposed the preliminary objection on the grounds that the Employment Act 2007 does not

apply to the claim, the cause of action having arisen before the Act was enacted. He submitted that the applicable law is the Industrial Court Act, Section 84 of the Labour Relations Act and Section 15 of the Trade Disputes Act. He submitted that limitation under the Trade Disputes Act is not 3 years, that the Claimants case in the Chief Magistrates Court was withdrawn with consent of the parties on 16th May 2011 and that time started running on that date so that the claim herein is well within the limitation period. He urged the Court to allow the case to go to full hearing without technicalities as enshrined in Article 159 of the Constitution.

I have read the pleadings and considered the arguments of the parties. The issues for determination are twofold. One; which law is applicable to the case and two; whether the claim is time barred.

The Claimants case is couched to have been brought under Section 84 of the Labour Relations Act and Section 15 of the Trade Disputes Act. Mr. Opini did not explain how he arrived at that conclusion. Section 84 of the Labour Relations Act reads as follows:-

- (1) The Trade Union's Act and the Trade Disputes Act are repealed.
- (2) Transitional provisions dealing with the transition from the Trade Unions Act and the Trade Disputes Act to this Act are contained in Fifth Schedule.

Section 15 of the Trade Disputes Act (repealed) provides for remedies that the Industrial Court may grant an employee who has been wrongly dismissed. Section 84 of the Labour Relations Act does not in itself say anything about limitation. It refers to the Transitional Provisions under the Fifth Schedule. I presume that Mr. Opini was referring to Paragraph 2(4)(a) of the Fifth Schedule which provides as follows:-

- (4) Where any of the following matters commenced before the commencement of this Act, the matters shall be determined in accordance with the provisions of the Trade Disputes Act (now repealed).
 - (a) Any trade dispute that arose before the commencement of this Act;
 - (b) Any Trade Dispute referred to the Industrial Court before the Commencement of this Act;
 - (c) Any revision or interpretation of an award by the Industrial Court, and
 - (d) Any summary dismissal that took place before the commencement of this Act.

My understanding of the provisions of the Schedule is that it does not provide for the limitation period at all. It only provides for the applicable law in cases of disputes arising before the commencement of the Labour Relations Act. Section 15 of the Trade Disputes Act (repealed) also does not apply to limitation period but rather to remedies by the Industrial Court.

The Trade Disputes Act provides for the time for reporting disputes under Section 4(4) which reads as follows:-

4(4) Any trade dispute involving the dismissal of an employee or the termination of any contract of employment shall be reported to the Minister within twenty-eight days of the dismissal or termination of employment:

Provided that the Minister may, if he considers that the circumstances of a particular case so warrant, accept the report of a trade dispute concerning a case of dismissal or termination not so reported to him within twenty-eight days.

The section would not provide a reprieve to the Claimant herein. In any event the Trade Disputes Act only applied to claims reported by Trade Unions to the Minister for Labour which were in turn referred by the Minister to the Industrial Court only if not resolved by the Minister. All other cases not reported to the Minister or not involving trade unions were filed in the regular Courts and were subject to the

Limitations of Actions Act. The Claimants case is thus subject to the provisions of the Limitation of Actions Act.

The second issue for determination is whether the claim as filed is time barred. As I have already established above, the case is subject to the Limitation of Actions Act and should have been filed within 6 years from the date the cause of action arose. This date cannot change because the case has been withdrawn from one Court and filed in another. Withdrawal of a case does not expand the limitation period. The argument by Mr. Opini that the limitation period started running on 16th May 2011 when the case was withdrawn from the Chief Magistrates Court is without merit. The correct procedure would have been to obtain an undertaking or order barring the Respondent from pleading limitation when the case is filed afresh in this Court in which event the Respondent would be consent in which event the respondent would be estopped from pleading limitation.

The claim as filed is on the face of it, bad in law as it is filed after the expiry of the limitation period without even in the least, pleading in the Memorandum of Claim the reasons for filing late. In the case of **ERIDAD OTABONG WAIMO –VS- ATTORNEY GENERAL’S CIVIC APPEAL NO.65 OF 1988**, the Court held that where a suit is instituted after the expiry of the period prescribed by the law of limitation the plaintiff shall show the grounds upon which exemption from such law is claimed.

In this case the Claimant should have pleaded the grounds which it relies upon to establish that the limitation period should be expanded. Without such pleading, the claim is bad in law on the face of it and would suffer the fate of rejection. From a reading of the Memorandum of claim the cause of action arose on 12th December 2004. The claim should therefore have been filed at the latest on 11th December 2010. It was however filed on 21st March 2012, one year and three months after the limitation period expired.

Mr. Opini urged the court to allow the case to go to full hearing without regard to technicalities as enshrined in Article 159 of the Constitution. I disagree with him that the issue of limitation is a technicality. Limitation period is a matter of substantive law that goes to the core of jurisdiction. Article 159 can therefore not operate to legitimize a claim that is barred by limitation.

So should this case suffer the fate of rejection?

My answer is no. The Claimant had in actual fact filed a case before the expiry of the limitation period. The law was subsequently changed removing jurisdiction from the Court where the claim was filed to this Court. Out of want of diligence or misapprehension on the part of his lawyers, the case was withdrawn instead of either being transferred to the right court or reserving the right to file a fresh case without the Respondent pleading limitation. I find the filing of the preliminary objection by the Respondent to be in bad faith as they were aware that in fact the Claimant went to Court in good time and that the current situation was brought about by the change of law which the Claimant had no control over, and the negligence of his advocates which should not be visited upon the Claimant. The ruling in **JOHN MWANIKI AND G4S SECURITY SERVICES LIMITED (2012) 3 KLR** referred to by the Respondent is not applicable to this case as the circumstances of the case subject to that ruling are not expressed in the ruling to be similar to those in this case.

The rationale for limitation of actions was considered in **R.B. POLICIES AT LLOYD’S V BUTLER (1949) 2 ALL ER 226 at pages 229 – 230** per Streatfield J:

“I cannot think that that is the policy of the Limitation Act 1939, or that to construe its words in favour of the plaintiffs would be to construe them in a way which harmonizes with the intention of the legislature. I agree that one of the principles of the Act is that those who go to sleep on their claims should not be assisted by the Courts in recovering their property. But another equally important principle is that there shall be an end of these matters, and that there shall be protection against stale demands.

In A’ Court V Cross, Best CJ referred to the policy of the Limitation Act, 1623, in this way (3 Bing

332):

“It has been supposed that the legislature only meant to protect persons who had paid their debts, but from length of time had lost or destroyed the proof of payment. From the title of the Act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have heard it often called by great judges, an act of peace. Long dormant claims have often more of cruelty than of Justice in them”.

The present case is not of a Claimant who sat on his claim, but of one who went to Court in time but was prevented from prosecuting a valid claim by change of law. He filed his case on 19th November 2007 before the coming into operation of the Employment Act on 2nd June 2008 and is therefore entitled to transfer the claim to the Court that acquired exclusive jurisdiction after his case had been filed. For the foregoing reasons I find that the claim herein is not time barred as it was first filed in Court within the limitation period. Secondly I find that the defects in the Claimants Memorandum of Claim are curable by amendment to show that the claim was first filed in the Chief Magistrates Court but was withdrawn and filed herein after the law changed to remove jurisdiction from the Chief Magistrates Court.

I further find that the preliminary objection is made in bad faith as the Respondent was aware of the circumstances of the late filing of the claim and consented to the withdrawal of the claim from the magistrates Court after the jurisdiction of that court was withdrawn by operation of the law.

I therefore make the following orders:-

- 1. that the preliminary objection is dismissed;***
- 2. that the Claimant amends the Memorandum of Claim to make it valid on the face of it within 14 days from the date hereof;***
- 3. that the Respondent files an amended reply to the Memorandum of Claim, if any within 14 days of service;***
- 4. that thereafter the case be set down for hearing on priority basis.***

Orders accordingly.

Read in open Court and signed this 31st of January, 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of: _____ for Claimant

_____ for Respondent