REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1003 of 2012

CATHERINE AUMA OGELLO ……...……...…...…….. CLAIMANT

-VERSUS-

KENYA LITERATURE BUREAU …….…...…….…. RESPONDENT

RULING

By a Memorandum of Claim dated 7th June 2012, the Claimant alleges unlawful dismissal by the Respondent and seeks the following prayers:-

a) A declaration that the Defendant's purported summary dismissal of the Plaintiff was unlawful, illegal and un-procedural.

b) An order that the defendant does pay to the Plaintiff a retirement settlement package based on the retirement terms and age 55 as if served or alternatively 12 months' salary in damages as required by law.

c) General damages in terms of Paragraph 2A and B.

d) Cost of this suit.

e) Interest on (b), (c) and (d) herein above at Court rates.

f) Any other or further relief as his Honourable

The Respondent filed a Memorandum of Defence on 27th August 2012 in which it alleges that sometime in January 2006 the Respondent launched investigations following complaints by customers and other support staff of stock shortages, that the investigations concluded that the Claimant together with others were colluding to engage in double invoicing which led to theft of stock, that the Claimant was first suspended from work and later summarily dismissed on 16th February 2006. The Claimant thereafter instituted suit in Nairobi HCCC No.21 of 2009 which was dismissed for want of prosecution.

On 25th January 2013 the respondent filed a Notice of Preliminary Objection on the following grounds:-

1. This suit is time barred under Section 90 of the Employment Act and Section 4 of the Limitation of Actions Act.

2. This Honourable Court does not have jurisdiction to determine labour disputes whose cause of action arose before the coming into force of the Employment Act, 2007.

3. This case is res judicata as it was dismissed in HCCC No.21 of 2009 for want of prosecution.

4. This case is an abuse of Court process and should be dismissed with costs.

The Preliminary Objection was fixed for hearing on 2nd April 2013 when only the Respondent was present while Counsel for the Claimant failed to attend Court. After ascertaining that the Claimant was properly served and an affidavit of service was on record, I allowed the Respondent to argue the Preliminary Objection in the absence of the Claimant.

Ms. Njakaila for the Respondent argued that the Claimants claim is time barred under both the Employment Act Section 90 and Section 4 of the Limitation of Actions Act, that the claim emanated from a labour dispute which occurred on 16th February 2006, that the claim before the Court was filed on 13th June 2012 which was in excess of the period allowed for claims to be sustainable before this Court under both Section 90 of the Employment Act and Section 4 of Limitation of Actions Act, that the Court does not have jurisdiction to determine claims that came into operation before the coming into force of the Employment Act 2007. Counsel relied on ***case No.741 of 2011 between Patrick Ochieng Onyango and East African Growers*** in which Hon. Justice Rika dismissed a claim on the basis that it was filed beyond the three year time limit in the Employment Act.

I have considered the grounds in the Notice of Preliminary Objection and the arguments of Counsel who has raised two issues as follows:-

(1) That the claim is statute barred both under Section 90 of the Employment Act and Section 4 of the Limitation of Actions Act; and

(2) That the Industrial Court has no jurisdiction to hear claims filed before the coming into operation of the Employment Act 2007.

I will start with the second ground that is that the Industrial Court does not have jurisdiction to determine claims filed before the coming into operation of the Employment Act, 2007.

This in my opinion is not a proper interpretation of the law. The Industrial Court as previously constituted first under the Trade Disputes Act Cap.234 and later under the Labour Relations Act has always had jurisdiction to hear claims arising from breach of the current Employment Act as well as the repealed Employment Act. It is the process through which the dispute was filed that determined whether or not the Industrial Court assumed jurisdiction. Under the Industrial Court as constituted under the Trade Disputes Act, only claims filed by Trade Unions or involving trade unions were referred to the Industrial Court by the Minister for Labour and no individual employee whose claim did not involve a trade union had access to the Court. However any claim filed after the coming into operation of the Employment Act 2007 and the Labour Institutions Act 2007 could be filed in the Industrial Court as the Court acquired exclusive jurisdiction over employment disputes through the two pieces of legislation.

On the ground that the claim is statute barred under both the Employment Act and Section 4 of the Limitation of Actions Act, I agree with the Respondent. The provisions of the Limitations of Actions Act are express on the limitation period. The claim herein, which arose before the enactment of the Employment Act 2007 should have been commenced within six years from the date of the cause of action. The Claimant actually did so via Nairobi HCCC No.21 of 2009 which was dismissed for want of prosecution. The case having been dismissed for want of prosecution, could be filed afresh but only before the expiry of the limitation period of six years. This case has been filed after the expiry of the limitation period without leave and without even the briefest of mention of the fact that the same course of action was the subject matter of another claim that was dismissed for want of prosecution. It has also been filed without reference to the grounds upon which extention of limitation period would apply. For this reason the claim is on the face of it, time barred and the Court therefore has no jurisdiction to hear the claim. The case is hereby dismissed.

Since the Claimant has brought the Respondent to Court for the second time unnecessarily, the claimant

will pay the Respondent's costs of defending the claim.

Orders accordingly.

Read in open Court and signed on this 30th day of April 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

No appearance

In the presence of:- _____ Claimant

Maganga Chris H/b for Mwongera _____ for Respondent