



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1844 of 2011

REBECCA NDUTA NGURE.....
CLAIMANT

VS

INVESCO ASSURANCE COMPANY LIMITED.....
.....RESPONDENT

Mr. Waiganjo Wachira for the Claimant

Mr. W.C. Koech for Respondent

RULING

By a Notice of Motion dated 2nd April, 2013 the claimant sought an order to consolidate this matter with 42 named matters before the Industrial Court. The Applicant also sought the Respondent to deposit Kshs.53,056,899 with the Court to secure the claimants' unpaid dues and entitlements pending this hearing and determination of the consolidated claims.

On 20th April 2012, the Respondent filed statement of Grounds of Objection under Rule 16(6) of the Industrial Court (Procedure) Rules, 2010. The Grounds of Objection were as follows;

- “1. *There is no jurisdiction under the provisions invoked by the Claimant to grant the prayers sought.*
2. *The 42 cases the subject of the application are all pending hearing and determination before this Honorable Court.*
3. *The Respondent has raised a very pertinent preliminary point of law against all the cases under Part VIII of the Employment Act, 2007 which point of law ought to be heard and determined first. The Respondent's case also has good chances of success on the facts of the case which grounds have been raised as alternative responses.*
4. *The application seeks an order compelling the Respondent to deposit the colossal sum of Kshs.53,056,879.00 or a bank guarantee for the said sum. This order cannot issue for the following reasons:-*
 - i) *The order being sought presupposes that the Applicants will succeed in their claims. That will be a matter for the court to determine and as stated above, the Respondent has raised a pertinent point of law that might as well dispose of all the cases.*

ii) *Parties to litigation must be placed at a level playing field to ensure fairness. Requiring the Respondent to deposit the said colossal figure in court before the disputes are heard and determined will be oppressive and will place it at a disadvantage in the litigation.*

iii) *All the material relied upon by the parties and their arguments must be presented and heard first by the Court on their merits.*

iv) *The grounds relied upon by the Applicants are unfounded, unsupported by any evidence and are at most sensational. The Applicants claim that the Respondent owes hundreds of millions and is in a shaky financial position. There is absolutely no evidence to support such allegations. The Applicants have the burden of proving the same which they have failed to do. The order sought cannot be given on the basis of unsupported statements of the advocate for the Applicants.*

v) *The Applicants also claim that the Respondent's 'file line' is an order annexed thereto as PWV 2. The said purported order is not signed and certified as required. Even assuming the same is in existence the same only applies to certain specific matters as a schedule thereto.*

5. *The Respondent is a registered insurance company under the provisions of the Insurance Act, Cap 487 of the Laws of Kenya. Under that Act there is rigorous supervision and regulation of insurance companies to ensure their financial stability. In particular Part V, Part VI, Part VII and Part VIII of the said Act.*

6. *There is absolutely no evidence that the Respondent is in financial difficulties. In fact the Respondent came out of statutory management on 18/1/2010 and that could only have been possible on the satisfaction of all the regulatory bodies that it is financially sound. The Respondent holds a valid license for the current year. A copy has been attached.*

7. *There is therefore no basis for the Applicants' apprehension that the Respondent will not be able to pay whatever Awards that might be given against it in this matter.*

8. *The application is therefore for dismissal.*

The Notice of Motion was to be heard simultaneously with the Preliminary Objection on a point of law contained in the Respondent's statement of the Response to the claim on 1st August, 2012.

The matter was heard by Justice Radido who granted an order consolidating the 42 matters listed in the Notice of Motion with this matter but was transferred to Mombasa before he could hear and determine the rest of the Application together with the Preliminary Objection.

The matter was set for hearing before me on 6th December, 2012 when the parties consented to have the part-heard proceedings before Justice Radido, set aside, save for the order of consolidation and the Application together with the Preliminary Objection be heard afresh.

They also agreed to proceed by way of written submissions, and the Respondent was to file within 14 days from that date whereas the Claimant was to file by 14th January 2013 and the matter was set for hearing before me on 25th January, 2013. The Claimant filed their response on the said 25th January, 2013.

On 25th January 2013, the Respondent was granted leave to file a further response to the claimant's written submissions which had just been received and was to do so within 7 days from that date and the matter was to be placed before the Judge on 1st February, 2013 for ruling on notice. The further submissions by the Respondent were filed on 30th January 2013 and the file was placed before me for ruling on 1st February, 2013.

The nub of the Preliminary Objection to the claims as filed is contained in the grounds of

objection and the written submissions and may be summarised as follows;

- (i) The Respondent Company was placed under statutory management by the Commissioner of Insurance on 29th February 2008 for reason of insolvency which fact resulted in termination of the employment of the claimants by operation of the law.
- (ii) The Respondent came out of the statutory management in February 2010.
- (iii) That the claimants should have availed themselves the remedies contained in part VIII of the Employment Act 2007, headed 'Insolvency of Employer' by writing to the Minister of Labour in terms of Section 66(1) thereof to be paid their terminal benefits. That such payments by the Minister upon satisfying himself of the fact of Insolvency are not to exceed Kshs.10,000 or one half of the monthly remuneration of each employee whichever is greater in terms of Section 69(i).

Such payment in terms of Section 68, includes;

- (a) any earned wages not exceeding 6 months.
- (b) Payment in lieu of notice
- (c) Payment in lieu of leave days not taken
- (d) Any basic award for compensation for unfair dismissal; and
- (e) Reimbursement of the whole or part of any fee or premium paid by an apprentice.

It is the Respondent's case that the claimants did not avail themselves of

this statutory remedy and therefore, their claims are bad in law. That if they had done so and the Minister had not paid their claims or did not pay adequately, they would have approached the court in terms of Section 71(1) of the Employment Act and the court would have made appropriate orders in the matter in terms of Section 71(3) by making an award to the employees and also declare the actual amount which the Minister ought to have paid.

For these reasons, the Respondent submits that the claims filed for constructive dismissal are bad in law because the Respondent did not terminate the employment of the claimants unlawfully and/or unfairly but the termination was by operation of the law.

In the case of *Re Forster Clark Ltd., Indenture Trust Loveland Vs Horscraft & Other* (1966) 1 A.E.R, 43, reference is made to *KERR ON RECEIVER* (13th Edn) p.318 as follows;

"The appointment of a receiver does not normally affect or determine contracts: where he continues to carry on the business as agent for the company, it appears that contracts based on personal relationship such as contracts of service (other than contracts as Managers which can hardly subsist together with the receiver's appointment) are not determined but, but where the receiver ceases to be agent for the Company or on his appointment becomes agent for the debenture holders such contracts are determined as where the appointment is by the court".

The Court was also referred to "The Law Relating to Receivers, Managers and Administrators: 3rd Edition by Hubert Picarda, P.11 where the author states, "certainly if an employee's contract of employment is automatically terminated by the appointment of a receiver in other words by operation of law, there can be no claim for unfair dismissal".

The Respondent thus insists that the claims are misconceived in law and should be summarily dismissed as the employee's remedies which were not pursued lie under part VIII of the Employment Act,

2007.

The Respondent has also raised another objection to the claim, in that, the same is statutory barred pursuant to Section 90 of the Employment Act 2007 in that it was filed on 3rd November 2011 whereas the cause of action arose in the month of February 2008 when the Respondent was placed under receivership.

Section 90 aforesaid provides that, notwithstanding the provisions of Section 4(1) of the Limitations of Actions Act no civil action or proceedings based or arising out of the Act or a Contract of Service in general shall lie or be instituted unless it is commenced within three years after the act, neglect of default complained or in case of continuing injury or damage within twelve months next after the scenario thereof.

The Claimants have responded to the Preliminary Objections as follows;

The preliminary objection is not a pure point of Law but constitutes both points of law and facts and therefore the same is incapable of determination before the main suit is heard. For this proposition, the court was referred to the case of Mukisa Biscuit Manufacturing Company Ltd., Vs. West End Distributors Ltd., (1968) E.A. 697; where it was held at page 7013 that;

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The claimant states that the issue whether the Respondent is a different entity from the pre-statutory management Invesco Assurance Company Limited is a matter of fact that requires to be determined to dispose of the legal issue raised. Accordingly, the matter should await full hearing. That the reason why the Respondent was placed under receivership is factual and same should await the hearing on the merits.

Furthermore, the claimants never received letters of termination until statutory management was lifted in February 2010 and the Company resumed operations. The complaints were therefore continuing as at the time the case was filed on 3rd November 2011. Section 90 of the Employment Act, on statutory bar is not available to the Respondent in the circumstances of the case and the Preliminary Objection should also be dismissed.

At the outset, the Court upon a careful analysis of the submissions by the parties and the law applicable finds that the fact that there may have been an alternative remedy by the Claimants in terms of Part VIII of the Employment Act 2007, that was not pursued is not by itself, a bar to the suit before court. What is paramount is whether upon a proper determination of the facts of the case, the suit has merit based on the proper interpretation of the provisions of the Employment Act 2007 as read with the Industrial Court Act 2011. That is a matter that will be properly determined upon a full hearing of the matter on the merits.

Furthermore, the court has carefully considered the submissions by both parties and finds that under Section 67 of the Insurance Act, Cap.487 of the Laws of Kenya pursuant to which the Respondent was placed under Statutory Management by the Commissioner, there is no provision for General termination of employees and therefore termination of any employee for whatever reason is a matter of fact that should be canvassed in the hearing of the suit.

Furthermore, the issue of continuity of employment due to absence of a letter of termination and especially because the statutory management was lifted and the Company continued to operate is a question of fact that should be disposed of at the end of the case.

This question affects the objection on Statutory Limitation because in the absence of a letter of termination, and given that the claimant waited patiently and requested to be taken back when the

statutory management was lifted poses factual issues that required determination. On the face of it, the claim cannot therefore be said to have been statutory barred.

This is a complex case involving issues of fact and law that require attention of the court. It also involves a large number of employees whose claims arising from lawful employment require determination. It is not a matter that the court can take lightly.

Whether the termination was by operation of the law or at the instance of the Respondents does not negate the various remedies available to, and sought by the claimants once the question of termination has been determined by the court.

Accordingly, the Preliminary Objections raised by the Respondent are dismissed and the suit is to take its normal course.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 10th day of April, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE