



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 2440 of 2012

MARTIN MAKAU KITHEKA CLAIMANT

VERSUS

UCHUMI SUPERMARKETS LIMITED RESPONDENT

RULING

This is a ruling in relation to the Preliminary Objection raised by the Respondent and dated 28th January 2013. Both parties filed their written submissions, with the claimant's dated 16th April 2013 and the respondent dated 19th April and a further submission dated 7th May 2013.

The grounds for the objection are;

1. That the cause of action herein accrued in June 2006. The claim is therefore time barred under the provisions of section 90 of the Employment Act and section 4(1) of the Limitation of Actions Act;
2. The claimant's right to sue having lapsed, he lacks the capacity to agitate any cause of action against the respondent. The claim is therefore an abuse of the court process.
3. This court has no jurisdiction to entertain this claim and ought to be struck out with costs.

The background of this case relates to a claim filed by the claimant dated 5th December 2012 on the basis that the respondent has refused to settle the claimant's terminal benefits. That on 28th August 2006 the respondent paid the claimant the sum of kshs.285, 830.00 being his employment terminal dues leaving a balance of Kshs.88, 600.00 which was to be paid after the respondent receivership was lifted. The tin 2010, the respondent receivership was lifted and they became listed at the Nairobi Stock Exchange on 31st May 2011 but the respondent has refused to pay the balance due claiming that under the receivership they could only pay 20% of what was due. The claim is therefore for the remainder of the dues amounting to kshs.88, 600.00 together with interest and costs.

This claim is opposed by the respondent on the grounds that the claimant employment with the respondent was terminated on 1st June 2006 and all his dues paid on 28th August 2006 and that no balance was left outstanding as stated in the claim as the total sum was acknowledged and the claimant signed for this final payment. That indeed the respondent was under receivership but there was no agreement that the claimant would be paid any monies. That the claim having arisen in August 2006 is now time barred and being founded on contracts offends the provisions of Section 90 of the Employment Act and Section 4(1) of the Limitation of Actions Act.

In submissions the respondent stated that the claimant was terminated on 1st June 2006 when the Employment Act, Cap 226 (repealed) was in force. That based on his contract of employment and pursuant to section 4(1) of the Limitations of Actions Act, his claim had a time limitation of 6 years and therefore the claimant had up to 1st June 2012 to file his claim. That this claim was filed on 5th December 2012 and therefore time barred. That when the cause of action arose the Industrial Court was constituted as under section 14 of the Trade Disputes Act (now repealed) and references to the court were as per section 8 of the same law. This provision required that disputes be referred to the industrial Court by the Minister or presentation by a trade union and the dispute could not be brought to court without reference for reconciliation and therefore the claimant lacks the capacity to bring the claim against the respondent.

That further to lack of capacity, under the Employment Act, 2007, the suit should have been filed within 3 years as under section 90 of the Act. That the submission by the claimant that there was an agreement to pay him is wrong since no such agreement exists as between the parties herein and therefore if there was any claim, the same arose as of June 2006 and now time barred. That if there was a claim as of 1st June 2006, the claimant should have filed this with the Minister as provided under the Employment Act, 226 and the Trade Disputes Act (both repealed).

The respondent further submitted that the issue of limitation is not a mere technicality but a substantive ground of law that a court must address. Cited was the case of *Kenya Scientific Research international and Allied Workers union versus T.N.S. Research International, Industrial Cause No. 27 of 2010* noting that the court has no mandate to entertain claims brought outside the limitation period.

The claimant on the other hand submitted that the claim was filed on 5th December 2012 was seeking for payment of balance on terminal dues necessitated by the respondent getting out of receivership from 1st June 2006 and through a collective bargaining agreement the respondent had informed its employees that they were entitled to a maximum of 20,000.00 preferential wage as provided for by the Companies Act, Cap 486. That in this agreement each laid off employee was to be paid their terminal dues and that 66.3% of the terminal dues would be paid with the remainder 30.7% being payable once the receiver was lifted. That based on the claim there exists a balance of 31.1% dues payable.

That the respondent receivership was lifted in January 2010 and any cause of action to recover any dues would only arise after this lifting of receivership. That by filing the claim on 5th December 2012 was within the allowable time within the meaning of section 4(1) of the Limitations of Actions Act and Section 90 of the Employment Act since the cause of action arose in 2010 when the receivership was lifted.

Claimant further submitted that they have the capacity to file this claim noting that the cause of action is based on neglect or refusal to pay the 30.1% balance of terminal dues that arose after the respondent receivership was lifted as of January 2010 and time only lapses in 2013 and not in 2012 pursuant to section 90 of the Employment Act. That under the labour Relations Act, this court has jurisdiction over this claim as all employment disputes are filed before this court. In this regard the claimant basis was the case of *Connection Joint versus Apollo Insurance 92006) eKLR* where the court lays the basis upon which preliminary objections can be made with reference to the case of *Mukisa Biscuits manufacturing Limited versus West End Distributors (1969) EA 696* noting that objections can only be made where facts upon which it is based are undisputed but on issues of law.

Looking at the issues raised in the preliminary objection I note The law applicable at the time of the termination of the Claimant's services as of 1st June 2006, was the Employment Act; Cap 226. This law was repealed by the Employment Act, 2007. A pertinent question to the determination of the preliminary objection is therefore whether the limitation provisions in section 90 of the Employment Act, 2007 is applicable to contracts of service terminated before its commencement, in other words if the Employment Act, 2007 extinguished the Claimants right to bring the Claim. My reading of the Employment Act 2007 has not found any provision in the Act which states that it shall have retrospective application. The only respect in which the Employment Act, 2007 applies to contracts of service entered into before its commencement in 2008 is its amendment of the terms of such contracts which were still subsisting to be construed as if they were made in accordance with it.

On the other hand, Section 93 of the Employment Act, 2007 sets out the transitional provisions relating to continuance of valid contracts of service and foreign contracts of service entered into before its commencement. At the time the contract of service in contention was terminated, the Employment Act, 2007 was not in place. In answering the question it should be noted that the employment/contractual relationship had ended on 1st June 2006 with the termination of the Claimant, a date before the commencement of the Employment Act, 2007. In this regard the continuance, application and interpretation of the contract in accordance to the provisions of the Employment Act, 2007 in case of inconsistency does not arise. Any disputes on limitation from such contract must be determined on the basis of the repealed Employment Act, Cap. 226 and the Limitation of Actions Act, Cap 22 Laws of Kenya.

A consideration of the Limitation of Actions Act and section 4 thereof is relevant. The section provides:

4(1) the following actions may not be brought after the end of six years from the date on which the cause of action accrued-

(a) Actions founded on contract;

(b) ...

It cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's employment was terminated on 1st June 2006, six years and a half (6 ½) from the date of filing this claim in the Industrial Court on the 5th of December 2012 and therefore by operation of the law, the claim lapsed on 1st June 2012.

This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims. This time can be extended upon the Court being moved by a party who on good grounds finds themselves under this circumstance. That is why the law exists to assist parties who for good reasons are unable to come to court in good time. This was not the case here.

I take it from the claimant's submissions that there was a collective bargaining agreement as between the parties where it was agreed on percentages payable upon the lifting of the receivership. This then translates to the fact that the claimant was unionised and as under the Trade Disputes Act, Cap 234 had audience before the Industrial Court to argue and protect his claim the receivership notwithstanding. This was not a bar to any claim as upon good consolidation of all assets; a receiver can offset any liabilities as per their mandate. Even if the claimant was not unionised where there was no collective bargaining agreement, he still had recourse to the ordinary courts as under his contract of employment. There was a time limitation both ways. This lapsed before the claimant came to court.

This claim does not fall under the ambit of the Employment Act, 2007 as the cause of action arose as of 1st June 2006 and based on the provisions of section 84 of the Labour Relations Act and section 93 of the Employment Act on transitional provisions, this dispute should have been resolved as under Trade Disputes Act, cap 234 Laws of Kenya (no repealed). The claim therefore does not conform to the mandatory time limitations. It must fail.

The preliminary objection is upheld. With that I strike out the claim filed on 5th December 2012. Each party to bear their own costs.

Dated and delivered in open court this 24th day of May 2013

**M. Mbaru
Judge**

In the presence of :
Jacob Kipkirui : court clerk

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