



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1686 of 2011

PETER MUSEMBI NZIOKI.....CLAIMANT

VERSUS

BARCLAYS BANK KENYA LIMITED.....RESPONDENT

RULING

This is a claim for wrongful termination of employment of the claimant Peter Musembi Nzioki by the respondent Barclay Bank Kenya Limited. That the respondent was employed by the respondent in March 1979 as a Bank Clerk in the Savings Department where he was on permanent and pensionable terms of service with a remuneration of Kshs.66,728.00 per month. That for unjustified reasons the claimant was terminated by the respondent on 16th April 1999 where he engaged internal dispute resolution mechanisms and filed PMCC No. 12429 of 2006 before the Magistrates' Court Milimani Commercial Courts. That on 14th September 2011 the RMCC 12429 of 2006 was withdrawn by mutual agreement of the parties herein to pave way for the institution of this Industrial Cause on 3rd October 2011.

On 24th February 2012 the Respondent filed their Notice of Preliminary Objection noting that the claim was incompetent, fatally defective and an abuse of the court process as the same was barred by statutes and set out the following:

1. That the suit offends the provisions of Section 4(1) of the Limitation of Actions Act Cap 22, laws of Kenya.
2. That the suit offends the provisions of Section 90 of the employment Act, 2007.
3. That the suit further offends the provisions of Section 4(4) of the Trade Disputes Act, Cap 234 (Repealed).
4. That the claimant has come to court too late in the day as he had lost his claim since his termination twelve years ago in April 1999.

The Respondent further gave reasons, the basis of their preliminary objection that under Section 4(1) of the Limitation of actions Act actions based on contract may not be brought to court after six years from the date on which the cause of action arose and there had been unreasonable delay on the part of the claimant in brining this action to court. That by first instituting a suit on 1st November 2006, the claimant was time barred in the lower court and there was no due diligence by the claimant.

That the claimant failed to comply with mandatory requirement of Section 4(4) of the Trade Disputes Act 9Now repealed) on the basis that any trade dispute involving the dismissal of an employee or the termination of any contract of employment shall be reported to the Minister within 28 days of the

dismissal or termination of employment. The claimant did not report the dispute with the respondent to the Minister as required by law. That under Section 90 of the Employment Act, 2007 provide that notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of the Employment Act or a contract of service shall lie or be instituted unless it is committed within three (3) years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve (12) months next after the cessation thereof.

When the matter came up for hearing the Court directed that the parties to proceed with the hearing of the Preliminary Objections and parties filed their submissions.

In the Respondent's submissions they relied on the listed points of law, outlined above, and on authorities on case law on the subject. In the case of ***Mukisa Biscuits Co. Ltd vs. West End Distributors Ltd (1969) E.A. 696*** where the court went into the issues of what should consist in a preliminary objection, and the court held that where there are points of law which have been pleaded, or which arise by clear implication out of pleadings and where argued would dispose the suit. The court gave examples of applicable objections are regards the jurisdiction of the court, limitations or there is a contract binding the parties to refer the dispute to arbitration. Then in these circumstances the court should hear these points of law before commencing the main hearing.

Also cited was the case of ***Tailors & Textile Workers Union vs. Moi University and Rivertext E.A. Ltd Industrial Cause No. 1981/11 consolidated with Cause No.1996/2011*** where the court held that *preliminary objection must relate to an issue of law, be argued on the assumption that all facts pleaded by the other side are correct and it cannot be based on the court's discretion.*

On this basis, the respondent submitted that the claim as filed offends the provisions of Section 4(1) of the Limitation of Actions Act, section 90 of the Employment Act and section 4(4) of the Trade Disputes Act. That by coming to court 10 years after termination he cannot rely on any statute or the Constitution as the same is not meant to act retrospectively. These were as reintegrated by Justice Radido in the case of *Maria Machocho vs. Total Kenya Limited, Misc. Appl. No. 2 of 2012.*

On the other hand the claimant submitted that the suit herein was filed on 23rd January 2007 and the same referred to the Industrial Court on 14th September 2011 following directives from the Chief Justice. That the issue of the claimants dismissal is an issue of fact that should be canvassed at the hearing and not by summary procedure and relied on the Case of *Kenya Local Government Workers Union vs. Kangundo Town Council, Cause no. 71 of 2009*, that held that trade disputes are unlike ordinary civil suits, they have multi-tiered resolution mechanisms and court action is just one of them at times the last of the mechanisms. That the court should be allowed to decide as to when the cause of action arose.

That according to the claimant, the cause of action arose when the respondent was not willing to honour the recommendation of the conciliator.

ANALYSIS

It is important to appreciate that for a long time in Kenya, employees have not had the necessary legal protection and a well laid down procedure that outline the unique circumstances of the labour relations until the enactment of the Employment Act, 2007 and the Labour Institutions Act with the former setting out the legal framework that is rights-based and the latter outlining key institutions that are to govern labour relations. These institutions include the Industrial Court as set out in the Industrial Court Act that give the Court a wide Jurisdiction to positively and proactively interpret various statutes vis-à-vis labour relations in Kenya. Of paramount importance is the place where protection of labour is situate under the Constitution, as a fundamental right and freedom under Article 41, which set out the labour regime and position the protection of fair labour practices under the Bill of rights making fair labour relations a condition fundamental to freedom of every human being.

By having Article 41 of the Constitution protecting labour relations/practices, it was a constitutional declaration with the purpose of ensuring that the legislative framework governing labour relations in

Kenya was in accordance with the Bill of Rights. This sets the right to fair labour practices in the equity jurisdiction of the Industrial Court, in a changed constitutional dispensation.

Previously the legal regime operative for labour relations was bound with constraints especially for individuals who were not unionized and had no muscle to fight with big entities as the only recourse was as outlined under the Trade Disputes Act, Cap 234 (now repealed) or a civil suit in ordinary courts as stipulated under Cap 22, Limitation of Actions Act, section 4(1) in matters of contract parties had up to 6 years since the time of cause of action to file their claims in court. However, to cushion employees who could not afford this very technical terrain of litigation before ordinary courts, the Trade Disputes Act under Section 4(4) did set out the applicable procedure in case of termination of employment, what was to happen. A party was within 28 days after termination or dismissal from employment supposed to report to the Minister and where this was not possible, the Minister upon good reasons or grounds could extend this time and allow a party to file their complaint. The Minister was then to appoint a conciliator.

From my assessment of the work of the conciliator, time is dependent on various factors but the date of conclusion of that process as by law established is of essence to the proceedings herein. The date of conclusion by the conciliator and his issuance of recommendations are crucial.

I have perused the claimants' memorandum of Claim; there is no indication as to when the Minister referred the matter to the conciliator. Despite stating that the respondent failed to recognize the recommendations from the conciliator, this record is not attached or outlined in the claim or in response to the preliminary objection despite this having been raised by the respondent citing the applicable sections of the Trade Disputes Act (now repealed).

That as it may be, I find the claimant has extensively cited the ***RMCC 12429 of 2006 before the Magistrates' Court Mililani Commercial Courts***. I take it that this matter was filed upon the respondent failure to acknowledge the conciliators' recommendation, otherwise there would have been no need to file that case at the Magistrates Court in 2006, which was over seven (7) years after the cause of action arose thus offending the provisions of section 4(1) of the Limitations of Actions Act. In the absence of citing the applicable dates for the conciliator's recommendations, a procedure allowed as under section 4(4) of the Trade Disputes Act (now repealed), the claimant becomes time barred under these provisions.

That said, I find this claim was filed on 3rd October 2011, based on admitted facts that the termination subject of the claim arose on 16th April 1999. The law applicable at the time of the termination of the Claimant's services 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.

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 16th April 1999 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.

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 16th April 1999, over 10 years from the date of filing this claim in the Industrial Court on the 3rd of October 2011 and therefore by operation of the law, the claim had by then lapsed.

Noting that RMCC 12429 of 2006 had already been filed, the Claimant should have applied the transitional provisions of the Employment Act to have the matter referred to the Industrial Court. The act of withdrawal of the matter unfortunately made him lose an essential component of his case. That of time. This is not a technicality that can be cured by invoking the cited authorities or any part of the Constitution.

As I have noted in an earlier case of ***Francis Mwamburi Madegu versus African Boot Company Limited, Industrial Cause No. 695 of 2012***, time is a legal requirement under Section 90 of the Employment Act and not a technicality. This 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. By filing a new claim, time became of essence at that point and by operation of the same law that time had already lapsed.

Section 90 of the Employment Act 2007 is not merely procedural but substantive provision. It affects rights which persons such as the Claimant enjoyed. It is a general presumption at common law and rule of statutory interpretation that statutes should not be interpreted to operate retrospectively unless there is express intention by the legislature.

In this regard the Interpretation and General Provisions Act, Cap 2 is also material. The Act in Section 23 provides:

(1) Where in a written law a reference is made to another written law, that Reference shall, except where the context otherwise requires, be deemed to include a reference to the last-mentioned written law as it may from time to time be amended.

(2) Where a written law repeals and re-enacts, with or without modification, a provision of a former written law, references in another written law to the provisions so repealed shall, unless a contrary intention appears, be construed as references to the provision so re-enacted.

(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -

(a) Revive anything not in force or existing at the time at which the repeal takes effect; or

(b) Affect the previous operation of a written law so repealed or Anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) Affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or....

The claimant failed to attach the ‘recommendation of the conciliator’ which would have guided the court as to the nature of recommendations and the role the respondent was expected to take. Even with this report, I find the cause of action arises as and when the disputed issue arises, that was the termination of the claimant by the respondent on the 16th April 1999. The claimant had a forum as under the Trade Disputes Act to file a complaint with the Minister or as under Employment Act, Cap 226 (repealed) to within six year to file his claim and by filing RMCC . 12429 of 2006 before the Magistrates’ Court Mililani Commercial Courts, is indicative that indeed he was aware of this right. The withdrawal of that suit had implications in law, which was to terminate that process and whatever the merits that case may have had, the current suit as filed offends the provisions of Section 90 of the Employment Act. These are mandatory provisions.

Therefore under the old regime under which the initial claim was filed before the Magistrate’s Court, that suit was withdrawn at the insistence of the Claimant herein. Under the Employment Act, 2007, this claim is time barred. This is incurable.

This Court will uphold the preliminary objections and dismiss the claim as filed.

Costs to the Respondent.

These are the orders of this Court.

Delivered in open court at Nairobi this 17th day of May, 2013.

Monica Mbaru
JUDGE

In the presence of

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