



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2053 OF 2012

ESTHER KAHAI KIHIMA CLAIMANT

VERSUS

TRIDENT INSURANCE COMPANY LIMITED..... RESPONDENT

RULING

This is a ruling regarding the preliminary objection raised by the respondent in the statement of reply to the claim dated 23rd November 2012 on the grounds that under section 90 of the Employment Act, 2007 the employment contract/relationship between the parties herein was determined on 1st July 2007 while the claim was filed on 10th October 2012 a period of 5 years and 3 months later. That the 3 years within which the claimant ought to have instituted her claim was determined on 1st July 2010 some 2 years and 3 months before the claim was filed and that the allegations in paragraph 4 of the claim to the effect that the delay in filing the claim by the claimant was occasioned by a medical condition which occurred on 18th August 2006 has no connection with the delay in filing this claim as it happened long before the contract was determined.

That the claim is therefore time barred and offends the provisions of section 90 of the Employment Act and to that extent null and void.

The respondent submitted that under section 90 of the Employment Act as read together with section 4(1) of the Limitation of Actions Act, Cap 22, limitation of actions should now be 3 years from the date of the cause of action. That sine the claimant was terminated on 1st July 2007; 3 years for her to file her claim lapsed on 30th June 2010 and therefore as under section 90 of the Employment Act, and the claim has lapsed. That section 90 was intended to outlaw the provisions of section 4(1) of the Limitation of Actions Act where a contract claim is based on 6 years and an employment contract being such a contract, this was changed by the provisions of section 90 of the Employment Act.

That the claimant cannot rely on her ill health or under section 27 of Limitation of Actions Act to extend time to file her claim as by 12th July 2007 she was aware of her ill health when she applied for retirement on medical grounds and in any event extension of time must be applied for before one files their claim in court. Therefore the claim is bad, it offends section 90 of the Employment Act and therefore null and void and should be dismissed with costs tot eh respondent.

In reply the claimant's advocate submitted that the law applicable at the time of the claimants termination on 1st July 20107 was the Employment Act, Cap 226 and not the Employment act, 2007. That the new law was enacted on 22nd October 2007 a time after the claimant was already terminated a period of 3 months after the cause of action arose. That the Employment Act, 2007 only came into force on 6th July

2008 and the applicable law was the Cap 226 as now repealed which provided for a period of 6 years for a claimant seeking rights under an employment contract to apply to court.

That the delay to claim in 5 years did not imply that the law applicable was the Employment Act and sine the Employment Act, 2007 is not retrospective, the preliminary objection should be dismissed with costs.

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 July 2007, 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 July 2007 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 with 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 July 2006; she filed her claim in court on 9th October 2012, a period of 5 years and two months, 8 months short of the 6 years deadline. Therefore, by the claimant coming to court at the nick of time, she should not be penalised. She could have filed her claim on the 1st of July 2007 up and until the 30th of June 2014 by the application of the time when her contract of employment was terminated.

The application of Employment Act, 2007 section 90 relate to all claims that arise or arose since its date of commencement being the 2nd of June 2008. This was at a time when the claimants' termination had already occurred and if she applied to court before the commencement of this law; her claim would have still been under the repealed Employment Act, Cap 226 Laws of Kenya and not as under the Employment Act, 2007. The transitional provisions under section 93(1) of the Employment Act, 2007 apply to very specific situations as stated above and do not extinguish claims that were valid before this Act came into force as the same was not meant to act retrospectively.

The preliminary objection is therefore declined. Parties are directed to set down the matter for hearing by taking hearing dates at the Court Registry.

Delivered in open court this 13th day of June 2013

M. Mbaru

Judge.

In the presence of:

Court Clerk: Jacob Kipkirui

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