



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 98 OF 2012**

**KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**OFFICE RESTAURANT .....RESPONDENT**

**R U L I N G**

The suit herein came up for hearing on 13/6/2013 when the respondent raised preliminary objection (P.O) in terms of her notice and pleading in paragraph 50 of her response. The ground upon which the P.O. stands is that the claim was filed out of the statutory period provided for under Section 90 of the Employment Act No. 11 of 2007 and Section 4(1) of the Limitation of Actions Act Cap 22 Laws of Kenya.

The parties agreed to dispose of the application by way of written submission which were highlighted on 4/7/2013. In his highlights, Mr. Nyamboye learned counsel for the respondent argued that under the provisions of the law cited above in support of the preliminary objection, the claim was time bared and should not be allowed to see the light of day in court.

In his view the provisions of the law cited did not leave any room for extension of time beyond the mandatory statutory period. In his view the suit was filed under the provision of the Employment Act No. 11 of 2007 which limits the period of filing a suit founded on Employment contract to three years vide Section 90 thereof.

In the alternative, he submitted that even if the suit was filed under the Employment Act Cap 226 Laws of Kenya (repealed), the same would still be time barred because it was filed outside the six years limitation period contemplated under the repealed law.

He relied on the recent decision of Radido J, in **ICC NO. 78 OF 2012 PETER NYAMAI & 7 OTHS vs M.J. CLERK LTD [2003] e KLR** in which the court struck out a memorandum of claim filed out of time. In the said case, the claimants, were dismissed from work variously between 2/10/09 and 7/11/2009 and filed their suit on 21/11/2012.

Mr. Okoth opposed the P.O. on behalf of the claimants by contenting that the suit was properly before the court. According to him the suit was commenced as a trade dispute before the Minister under the Trade Disputes Act Cap 234 laws of Kenya (repealed) and later referred to the court by the Minister under the said Trade Disputes Act.

That the proceedings of the per-industrial proceedings were forwarded to the court and a court file

opened as ICC 1026 of 2011. That the said file was forwarded to this court and allocated the current Number ICC 98 of 2012. In his view therefore, the suit is not time barred and should not be dismissed in view of rule 4 of the fifth schedule of IRA.

I have carefully perused the court record and considered the submissions made in support and in opposition to the P.O. The dispute cited on the Memorandum of Claim is unfair, unlawful, wrongful and invalid redundancy of Mr. Douglas Konga. The law alleged to have been violated is Section 40 and 41 of the Employment Act 2007, ILO Convention 158 of 1982, Article 41 of the Kenya Constitution 2010 and the Government General Order & Hotel & Catering Traders order.

The memorandum of claim does not state when the redundancy was declared but Appendix 6 in the said memorandum talks of 28/7/2006. A simple calculation of the period between 28/7/2006 and 26/3/2013 when the memorandum was filed would be approximately 6 years 8 months. Under Section 90 of the Employment Act 2007 the suit was filed late by over 3 ½ years and about 8 months late under Section 4 of the Limitation of Actions Act.

However upon keen consideration of the claimants submissions, I have been able to find that the present dispute involves different circumstances. From that **PETER NYAMAI'S CASE**, I will therefore not casually deem that the claim before the court was filed under Employment Act 2007. There is overwhelming evidence to show that the dispute is much older than the law on which it purports to be founded.

It is obvious from Appendix 5 and 6 in the Memorandum of Claim that on 5/10/2006 the claimant reported a trade dispute with the minister under Section 4 of the Trade Disputes Act. That an investigator was appointed under Section 7 of the said Act. That the investigator made a report to the Minister who then referred the dispute to court under Section 14 of the said Act.

It is clear from the court record that after the dispute was referred to the court the court directed the claimant to file a statement of claim on or before 11/1/2012 and the respondent to file statement of responses by 19/1/2012. That direction was repeated severally until the parties filed their respective statements in 2013.

Section 4(b) of the Trade Disputes Act (repealed) provided that termination by redundancy could not take effect until the dispute was reported to the Minister. There is no way therefore that a redundancy claim could ever be time barred under Trade Disputes Act.

The court therefore finds that the suit being one commenced under Section 4 of the Trade Dispute Act is properly before the court. Rule 4 of the fifth schedule of the Labour Relations Act 2007, is a transition provision from Trade Disputes Act to the Labour Relations Act 2007. It provides that trade disputes commenced under the former law shall be determined under the repealed law.

Consequently the dispute before the court should be governed by the said Trade Disputes Act to its logical conclusion whether the statements filed by the court refer to the 2007 Employment Laws or not. The Preliminary Objection is therefore dismissed with no order as to costs.

I have also in my own motion granted leave to the parties to amend their respective pleadings to conform with the Trade Disputes Act Cap 234 Laws of Kenya (repealed)

**Signed dated and delivered this 26th July 2013**

**ONESMUS MAKAU**

**JUDGE**