



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA NAIROBI

CAUSE NO. 917 OF 2012

(Before D.K.N. Marete)

HARUN OCHIENG MASESE.....
.....CLAIMANT

versus

POSTAL CORPORATION OF KENYA.....RESPONDENT

RULING

On 30th May, 2012, the claimant filed his memorandum of claim dated 28th May instant. The respondent did not file a defence to the claim but instead filed a preliminary objection dated and filed on 20th July, 2012. This is based on the following points of law;

1. That the statement of claim filed herein is statute barred.
2. That the statement of claim as filed is in contravention of the provisions of Postal Corporation of Kenya Act, 1998.
3. That the statement of claim herein is vexatious, frivolous and an abuse of the court process.

The matter came for various mentions and hearings in court until the 27th July, 2013 when it was heard *inter parties*. The respondent's position and submission is that the claim as filed is statute barred, the claimant having been dismissed in February, 2006. The claim was filed on 30th January, 2012, a period of more than six (6) years from the date of termination. This, he submitted is contrary to the provisions of section 4 (1) (a) of the Limitation of Actions Act, chapter 22, Laws of Kenya and section 90, Employment Act, 2007 which stipulate a timeline of six (6) and three (3) years respectively for filing such claims. On this ground, this suit should not be allowed to continue.

The respondent also opposes the replying affidavit on grounds that it has been sworn by counsel on record and based on contested facts and is therefore incompetent and unsustainable for purposes of pursuing this preliminary objection.

Again, this suit is an offspring of Chief Magistrate's Civil Case No. 120 of 2009 where the pleadings are the same. Counsel for the claimant/applicant argues that this should have been a case for transfer and also that the verifying affidavit in support of the claim is a falsity. The preliminary objection should therefore be sustained and allowed.

Mr. Kimacia, counsel for the claimant submits that there is a pending suit in the lower court and that he had acted on the directions of the court to bring the matter to this court. He further submits that the doctrine of laches is not relevant in the circumstances, the claimant having filed his claim before the lapse of the period of limitation.

The claimant further rubbishes the authorities submitted in support of this preliminary objection and argues that there has not been any dismissal. He deems it proper and submits that this matter continues with the earlier matter on the memorandum of claim filed herein.

The respondent reiterates his submissions in the Replying affidavit sworn on 24th November, 2012 in opposition to the preliminary objection. He admits that the matter indeed started as CMCC No. 120 of 2009 and that on 1st March, 2012, the magistrate advised the claimant to file the cause in a “court of jurisdiction” and therefore the filing of this suit on 30th May, 2012.

The claimant/respondent also admits that in the drafting of this suit, there is no indication that there is another pending suit and that the averment on the subject in the verifying affidavit was an inadvertent error on the part of the advocate and therefore should not be visited on the litigant. He further avers that there is a pending application in the magistrate’s court for transfer and express orders to this extent but this is still pending. He therefore prays that this application be stayed until the application pending in the Chief Magistrate’s court is heard and determined as any other recourse would be highly prejudicial to the claimant. This would also not prejudice the respondent.

This is a long story and the positions of the parties conflicting. I have looked at the positions of the parties and find the claimant/respondents position wavering and unsustainable. This is because from the onset this cause falls into the paradigms of being statute barred. As submitted by the respondent/applicant, the suit is instituted well over six (6) years from the date of alleged termination of employment and therefore is out of tune with section 4 (i) (a) and section 90 of the Limitation of Actions Act and the Employment Act, 2007 cited herebelow;

Section 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.
- c.
- d.
- e.
- f.

Section 90, Employment Act, 2007;

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

The suit is therefore statute barred and cannot be salvaged.

Secondly, the conduct of the claim is self defeating. In 2009, the claimant’s filed CMCC No. 120 of 2009 in the lower court and this is still pending and alive. On 30th May, 2012 this claim is filed here. The claimant in his replying affidavit to this preliminary objection avers that the filing of this suit was on the advice of the magistrate presiding over the earlier suit. He also offers multifarious reasons and excuses for his action in filing this suit during the pendency of the other one. Good.

Counsel is expected to rely on his intellectual prowess in law and practice in all dealings of his legal practice. It is expected that research and appropriate consultation should be had by counsel and any shortfall on this is not palatable or excusable. It is professional bliss. This malpractice and clear defect on the pleadings in this claim on itself blots its efficacy as an appropriate action before court. It renders it ineffective and unsustainable and I so find.

I would in the circumstances find in favour of the preliminary objection, and uphold the same. This claim therefore fails and is dismissed with costs to the respondent.

Dated, delivered and signed this 1st day of August, 2013.

D.K. Njagi Marete,

JUDGE.

Appearances:

1. Mr. Kimacia instructed by Nyaberi & Company Advocates for the claimant/respondent
2. Mr. Kiprono instructed by Kwengu & Company Advocates for the objector.