



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

**CAUSE NO. 105/2013**

(Before Hon. Justice Hellen Wasilwa on 3<sup>rd</sup> October, 2013)

PATRICK NYAKONU OMBATI ..... CLAIMANT

**-VERSUS-**

CREDIT BANK LIMITED ..... RESPONDENTS

**R U L I N G**

The respondent herein Credit Bank Limited have filed a preliminary objection in respect of this claim on the grounds that:-

(a) This claim is bad in law and is time barred as it violates the provisions of Section 90 of the Employment Act 2007.

(b) This court lacks jurisdiction to entertain paragraphs 35(g) and (h) of the claimants memorandum as they are strange claims outside the ambit of the Industrial Act 2011. They referred court to paragraph 20 of the memorandum of claim which states that the services of the respondent were terminated on 6.2.2006 as the termination letter at page 36 of the bundle of documents. They submitted that, the claimant having been terminated on 6.2.2006 the claim should have been filed by 5.2.2009. They aver that the claimant never moved court to extend time. They cited **Peter Nyamai & 7 Others =VS= V. M. J. Clarke Limited [2013] eKLR.**

On 2nd issue, at paragraph 35(g) and (h) of the claim, the claimant is claiming for damages for racial discrimination and malicious damage which respondent applicants submit that this court has no jurisdiction to grant.

The claimant respondents opposed this application. According to the claimants, the cause of action arose on 19.11.2010 after the criminal proceedings initiated by the respondent came to an end and therefore the claim is filed within the time under the previous law Employment Act (now repealed). They also refer court to Cap 2 which at S. 23(3) (b) (c) (d) and (e) clearly states the consequences of repealed provisions of law on accused rights and obligations. They submit that the cited case has no bearing on this case, the cause of action having occurred after the new Employment Act 2007 came in force. On jurisdiction, the claimants submit that this court has jurisdiction to entertain the claim as provided for in the Industrial Court Act 2011's preamble and in the provisions on the court's jurisdiction.

Having heard the submissions from both parties the issues for determination are:-

1. Whether this claim is time barred
2. Whether this court has jurisdiction to entertain this claim.

On 1st issue, the claimant was indeed dismissed by respondents in the year 2006, 6th February. Preceding this dismissal, the claimant contends that on 21.1.2006, the respondents asked him to proceed on compulsory leave immediately to facilitate certain investigations. On 2.2.2006, while in his office, the claimant was arrested by police and detained at Kisumu Police Station at the instigation of the respondent. The police proceeded to charge him in Kisumu CMCC Criminal No. 87 of 2006. On 6.2.2006, the respondents delivered a termination letter at his house without indicating reasons for the termination. The claimant went through the trial which culminated in his acquittal on 19.11.2010 for lack of evidence and without being put on his defence.

The question then is whether claimant would have filed his case against the respondents when the criminal case was still pending in court. I believe he could not have done so. In any case, the dismissal occurred in 2006 and therefore the law governing how he could proceed against the respondents cannot be Employment Act 2007 as this will amount to applying the Employment Act 2007 retrospectively. Section 90 of Employment Act 2007, does not therefore apply here. Having proceeded to court within 3 years after the acquittal in November 2010, then he remains within the limitation period and I find so.

On 2nd issue on jurisdiction of the court. This is established under Article 162(2) of the Constitution and S. 12 of the Industrial Court Act 2011. Section 12(1) of the Industrial Court Act 2011 states that:-

**“The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the Provisions of this Act or any other written Law which extends jurisdiction and labour relations including;**

**(a) disputes relating to or arising out of employment between an employer and an employee.**

**(b) --- “**

The dispute filed herein by the claimant, arises out of his employment relationship with the respondent and therefore this court is the right forum for this dispute as envisaged under S. 12(1) (a) of the Industrial Court Act. It would not be prudent for the claimant to seek certain prayers before this court and move to yet another court to seek the remainder of the prayers. To deny him audience to be heard by this court on the ground that this court does not have jurisdiction to grant certain prayers would be to deny him his right under Article 48 of the Constitution in access to justice which states that:-

**“the State shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice.”**

For reasons stated, I find that the preliminary objection has no merit and I dismiss it accordingly.

**HELLEN WASILWA**

**JUDGE**

**3/10/2013**

**Appearances:-**

Gichaba for claimant present

N/A for respondent

CC. Sammy Wamache.

