



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)

PETITION NO. 1 OF 2013

In the matter of Article 21,22,23,28,41,47,50 and 159 of the Constitution of Kenya, 2010

and

In the matter of Article 23 of the Universal Declaration on human rights and Article 15 of the African Charter on human and Peoples Rights.

and

In the matter of infringement of the Petitioners rights to fair labour and administrative practices and right to judicial authority as stipulated in the Constitution of Kenya

Between

JOSEPHAT NDIRANGUPETITIONER

and

HENKEL CHEMICALS (EA) LTD.....RESPONDENT

RULING

1. Josephat Ndirangu (Petitioner) was employed by Henkel Chemicals (EA) Ltd (Respondent) on 1 October 2002 as a Sales Representative. By a letter dated 24 August 2009 the Respondent informed him that he was being dismissed instantly for insubordination contrary to section 44(4) (e) of the Employment Act.
2. The Claimant being dissatisfied with the summary dismissal moved the Chief Magistrates Court in Mombasa Civil Case No. 1133 of 2010, *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* on 3 May 2010. The Claimant withdrew the suit because of lack of jurisdiction by the Magistrates Court in employment and labour complaints.

Cause No. 49 of 2013

3. On 15 March 2013 he lodged a Memorandum of Claim against the Respondent in which the issue in dispute was stated as *unlawful and summary dismissal of the Claimant from employment*. The Claim was registered in the Court as Cause No. 49 of 2013.

4. In the Claim, the Claimant sought a declaration that the dismissal of the Claimant's employment by the Respondent was unjustified, unlawful, wrongful and illegal, an order directing the Respondent to pay the Claimant his statutory entitlement and terminal dues totaling Kshs 398,752/- and costs.
5. On 6 May 2013 the file was placed before me and Mr. Panyako for the Claimant informed me that the Respondent had been served and he therefore wanted a hearing date. I fixed the hearing of the Cause for 28 May 2013.
6. The Respondent was served and it filed a Response on 27 May 2013. At the same time the Respondent filed a Notice of Preliminary Objection to the Claim on the ground that the Claim was time barred under the provisions of section 90 of the Employment Act and further that the Claim was therefore an abuse of the courts process.
7. On 28 May 2013 Mr. Panyako asked for time to respond to the preliminary objection filed by the Respondent. I granted him time and set the objection for arguments on 18 June 2013.
8. On 18 June 2013 the Claimant filed a motion seeking that the Court do extend time for filing the suit and the grounds stated on the face of the motion included that unless the Claimant is granted leave his constitutional rights to have the claim heard and determined on the merits would be defeated.
9. The Claimant further informed the Court that the parties were negotiating a settlement and they required 30 days. In the circumstances I fixed the preliminary objection and the motion to extend time to 22 July 2013.
10. The applications were not heard on that day but the next day, 23 July 2013 Mr. Panyako informed me that the Claimant had filed a constitutional Petition.
11. I directed that the matter be mentioned for the hearing of the preliminary objection on 30 September 2013.
12. The Petition was placed before me on 24 September 2013 and I ordered that the preliminary objection be heard together with the challenge to the competence of the Petition.
13. The parties made reference to the cases of *Domnic Arony Amolo v The Attorney General*, Nairobi High Court Misc Application No. 494 of 2003, *Wachira Weheire v The Attorney General*, Nairobi Misc Civil Case No. 1184 of 2003, *Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute* (2013) eKLR and *Abdul Aziz Juma v Nikisuhi Investments & 2 others* (2013) eKLR.
14. I have considered the authorities but they are not of much assistance in the determination of the issues arising.

Petition No. 1 of 2013

15. The Petition was filed on 12 July 2013. The Petitioner was named as Josephat Ndirangu and the Respondent as Henkel Chemicals (EA) Ltd. The Petition in the main was complaining that the summary dismissal of the Claimant by the Respondent on 24 August 2009 on allegations of insubordination was unlawful, wrongful and that the Respondent was hindering the Claimant in his pursuit of rights and justice and that by the Respondent seeking to have the Cause declared time barred would be against Article 159(d) of the Constitution.
16. In the Petition therefore the Claimant sought a declaration that the Respondent violated his rights to fair labour practices and fair administrative action, a declaration that the termination of the Petitioner's employment was unfair and unlawful, a declaration that the Petitioner is entitled to terminal benefits and compensation for loss of employment and service pay, an order to the Respondent to pay the Claimant terminal benefits and costs.

Competence of the Petition

17. The Petition was filed some four months after the filing of the Memorandum of Claim in Cause No. 49 of 2013. The parties in both actions are the same. The subject matter of litigation in both instances is the same and the gravamen is the unfairness/unlawfulness of the Claimant's summary dismissal.
18. The reliefs sought in both cases are more or less the same. A declaration that the dismissal of the Claimant was unjustified, unlawful, wrongful and illegal and payment of terminal benefits.

19. The question which the Court needs to discuss is whether it was open to the Claimant to file a Petition in which the same issues for determination had been raised in Cause No. 49 of 2013.
20. In my view a litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the Constitution on the right to fair labour practices. The purpose of the Constitution is that the right to fair labour practices is given effect in various statutes of which the Employment Act and the Labour Relations Act are primary.
21. The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the Employment Act and the Labour Relations Act give effect to constitutional rights.
22. It is clear to my mind that the Claimant filed the Petition after realizing that the Cause he had filed was under legal attack and there was not any legal defence to the attack on the ground of time bar.
23. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) were gazetted through Legal Notice No. 117 of 28 June 2013 before the institution of this Petition. The rules do not have on the face of it a commencement date.
24. Unlike the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, (Gicheru Rules), the Mutunga Rules do not have the equivalent of rule 23 which provided that

Where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.

25. In my view in spite of the differences, the legal principles which were set in decisions such as in *Patrick Ochieno Abachi v Kenya Anti Corruption Commission* (2010) eKLR when considering the interpretation of rule 23 of the Gicheru Rules are still relevant. These are that a single judge in the High Court and a three bench judge in the constitutional court have concurrent jurisdiction and there should be no duplication of causes of action in different proceedings.
26. The constitutional issues raised by the Claimant in the Petition are the same as those raised in Cause No. 49 of 2013. As a matter of judicial economy and policy to avoid conflicting decisions, the Petition should not be allowed to survive, it having been filed as an afterthought and to avoid the legal minefield confronting the Claimant in the Cause.
27. The Petition cannot survive the legal assault because it is an abuse of the courts process and must be struck out.

Whether Cause No. 49 of 2013 is time barred

28. It is not disputed that the Claimant was dismissed on 24 August 2009. At the time of dismissal the Employment Act had been in operation for nearly one year. Section 90 of the Act now regulates limitation time in employment contracts to three years. The Cause should therefore have been filed on or before 24 August 2012. But it was lodged in Court on 15 March 2013. It was time barred.
29. Section 4(1) of the Limitation of Actions Act is not applicable and therefore the Claimant cannot be heard to argue that the limitation was 6 years.

Whether Court can extend time

30. The Claimant filed a motion seeking the extension of time. The motion was anchored on Articles 50 and 159(2) of the Constitution and sections 1, 1A, 1B, 3,3A of the Civil Procedure Rules and section 4(1) of the Limitation of Actions Act.
31. Section 4(1) of the Limitation of Actions Act was amended partly by section 90 of the Employment Act. Section 90 provides for a limitation of three years but it has no provision for extension of time to bring a claim out of time.
32. This Court has in the recent past dealt with the question whether it has power or jurisdiction to extend time.
33. The Court's answer and what I understand to be the correct legal position is that the Court has no

jurisdiction to extend time to commence claims arising out of contract, employment contract included once time has expired or lapsed.
34. And the authority for this holding is the Court of Appeal decision in *Divecon v Samani* (1995-1998) EA 48. The Court held itself thus

to us, the meaning of the wording of section 4(1)is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.....A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that “the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked (my emphasis).

35. To my mind, similar principles in respect of what the Court of Appeal stated about section 4(1) of the Limitation of Actions Act apply in respect of section 90 of the Employment Act and I would for the sake of clarity state that no employee has the right or power to bring after the end of three years from the date of dismissal or termination, an action founded on a contract of service and that the Industrial Court has no right or power to entertain such claims or extend time for bringing such action.
36. I state so bearing in mind that the Employment Act, 2007 has no provision for grant of leave to institute claims out of time or to extend time within which to commence such actions.

Conclusion and Orders

37. The preliminary objection succeeds.
38. It is unfortunate but the Petition must be struck out for being an abuse of the court's process.
39. For the avoidance of doubt, Cause No. 49 of 2013 must also be struck out because it was filed out of time and the Court has no jurisdiction to extend time. Motion to extend time is also dismissed.
40. The Respondent will have costs of the Petition and the Cause.

Delivered, dated and signed in open Court on this 8th day of November 2013.

Radido Stephen

Judge

Appearances

Mr. Panyako instructed by Kiarie

Kariuki & Co. advocates..... for Petitioner/Claimant

Mr. Nanji instructed by Hamilton

Harrison & Mathews Advocates.....for Respondent