



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1189 OF 2012

MACHUKA ANYONA JULIUS1ST CLAIMANT
DUNCAN MUTUKU KING'OO2ND CLAIMANT
JEREMIAH KAMAU MURAGURI.....3RD CLAIMANT
GRISPHEN JUMBA CHANZU.....4TH CLAIMANT
BERNARD GITAU WAIREGI.....5TH CLAIMANT
JACQUILINE MUTETHYA JOHN.....6TH CLAIMANT

VERSUS

OMAERA PHAMACEUTICALS LIMITED RESPONDENT

RULING

1. The claimants filed the claim on 13th July 2012 seeking damages for unfair termination or reinstatement by the respondent Omaera Pharmaceuticals limited. On 25th September 2012, the respondent filed their defence and admitted the claimants were their former employees who were terminated and or dismissed from gross misconduct, desertion and unprocedural resignation and hence deny the entire claims as stated. On 4th June 2013, the respondent filed their Notice of Preliminary Objection with regard to the claim of the 2nd and 3rd claimant noting that the same is statute barred. The 3rd claimant filed Grounds of opposition to the objections filed the respondent on the 15th July 2013. Both parties agreed to file their written submissions in this regard.

2. In the Grounds of Opposition, the 3rd claimant noted that the Employment Act took effect on 2nd June 2008 where he was dismissed in January 2008 and hence the applicable statute was the Employment Act Cap 226 where the limitation period was 6 years unlike the provisions as under section 90 of the Employment Act, 2007. That the 6 years have not lapsed since the law does not act retroactively and the new legislation is introduced to have prospective application and if it had been intended to have retrospective effect, this should have been provided for. That the right to bring a claim by the third claimant against the respondent accrued in January 2008 when he was dismissed and the applicable statute then was the employment Act, Cap 226 and thus the preliminary objection lacks merit and should be dismissed.

3. The respondent in submissions stated that in the claim filed on 16th July 2012, the claimants were employed on various dates but the claim with regard to the 2nd and 3rd claimants is barred by limitation and should be struck out. That at paragraph 20 to 29 of the claim, the 2nd claimant is stated to have been employed in October 2000 and was dismissed in February 2009. The 3rd claimant at paragraph 29 to 38 is stated to have been employed on August 2003 and dismissed in January 2008. The cause of action for the 2nd and third claimants arose in February 2009 and January 2008 respectively. That this time is way out of the limitation period which lapsed after three (3) years.

4. The respondent further submitted that under section 3 of the Employment Act, the Act only apply to employees who have a contract of service and to rely on the Employment Act, 2007, section 90 of the same bar any actions after 3 years. The suits herein with regard to the 2nd and 3rd claimants have therefore been filed out of time and cannot be cured in any other way. The claimants filed the claim on 13th July 2012 a period way after the 3 years lapse. That in the case of *peter Wangai Kiama versus Lawrence Gelimoni and others, Cause No.1170 of 2010*, the court dismissed a claim that was filed out of the limitation period of 3 years.

5. That the claimant's failure to file their claim in good time cannot be cured by the operation of Article 159(2) (d) of the Constitution which obligates the court when exercising judicial authority to administer justice without undue regard to procedural technicalities but the court must define what procedural technicality is. That where there is a breach of a statutory provision that is mandatory as the case for section 90 of the Employment Act this is not a procedural technicality but an issue that goes to the core of the claim herein. Thus Article 159 of the Constitution cannot come to the aid of the claimants.

6. The claim for 2nd and 3rd claimant should therefore be dismissed. Costs awarded to the respondent.

7. In reply, the claimant submitted that the 2nd claimant was employed by the respondent in October 2000 and was never issued with a contract of service and was also dismissed orally in 2009. That since the 2nd claimant's termination, he filed his claim within 3 years even though the actual date of termination was not documented which issue can only be addressed at a full hearing. The claimant relied on the case of *Balozi Housing Cooperative Society Ltd versus Samuel Waiganjo Thuo t/a Waiganjo and Associates [2002] eKLR* where the court held that in a case with a single triable issue, a party should be given their day in court and the same issue heard on merit.

8. The 3rd claimant was employed by the respondent on 1st August 2003 and was dismissed in January 2008 and the operational statute then was the repealed Employment Act, Cap 226 Laws of Kenya with a limitation period of six (6) years. That the claim for the 3rd claimant is filed within the 6 years since his termination as the provisions of the Employment Act, 2007 are not retrospective. The claimant relied on the case of *Municipal Council of Mombasa versus Nyali Ltd [1963] EA* where the court held that procedural provisions do not operate retrospectively as that would manifest injustice.

9. On this basis the preliminary objection by the respondent have no basis and should be dismissed with costs tot eh claimants.

On the issues raised by the respondent as preliminary objections, this court must address the following questions

Whether the 2nd and 3rd claimant claim are premised on the provisions of the Employment Act, 2007 or Cap 226 now repealed; and

Whether the 2nd and 3rd claimants case is statute barred.

10. The Employment Act, Cap 226 was repealed by the Employment Act, 2007 when it came into force on 2nd June 2008. 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.

11. Employment Act 2007 has no 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. 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.

12. At the time the contracts of service in contention were terminated, the Employment Act, 2007 was only in force with regard to the 2nd claimant as the Employment Act, 2007 came into force on 2nd June 2008 whereas he was terminated in February 2009. The 3rd claimant was however outside the provisions of the same as he was terminated in January 2008, a time before the coming into force of the Employment Act, 2007.

13. In answering the question it should be noted that the employment/contractual relationship had ended in 2009 and 2008 for the 2nd and 3rd claimants, respectively, one after and the other before the commencement of the Employment Act, 2007. In this regard the continuance, application and interpretation of the contracts in accordance to the provisions of the Employment Act, 2007 in this case is radically different. The claim for the 2nd respondent must be determined as under the provisions of the Employment Act, 2007 while that of the 3rd respondent fall under the repealed law, Cap 226.

14. The claim herein is premised on the employer and employee relationship as between the claimants and the respondent. I note the claimants were employed on divers dates as well as dismissed on divers dates. The contention herein is with regard to the claim filed by the 2nd and the 3rd claimants that is stated to be time barred as under the provisions of section 90 of the Employment Act, 2007. As submitted by the 2nd claimant, he was employed in October 2000 and was dismissed in February 2009. The 2nd claimants claim is premised on his termination by the respondent who failed to give him a written contract, a termination notice, wrongful dismissal and that he was not issued with a Certificate of Service. These are claims outlined as under the Employment Act, 2007 as indicated in the remedies sought under paragraph 28 of the Claim.

15. Is this claim time barred as under the law? Section 90 of the Employment Act, 2007 creates mandatory provisions that all claims must be filed within 3 years. The 2nd claimant was terminated in February 2009 and this claim was filed on 13th July 2012. To thus rely on the provisions of the Employment Act, 2007, the 2nd claimant's claim lapsed on the midnight of 1st March 2012. The claimant has however sought to rely on the provisions of the repealed Employment Act Cap 226 which allow claims within 6 years. However, the remedies sought cannot be granted as under the provisions of the repealed legislation and to rely on the Employment Act, 2007, time has not been enlarged or leave sought so as to file the 2nd claimant's claim out of time. This claim was filed 3 months short of the time allowed as under the Employment Act, 2007. Section 90 in this regard is stated in Mandatory terms. It is not stated what the 2nd claimant has done with regard to the prosecution of his claim before a Labour Officer, a Conciliator or before any other court so as to benefit from the Court consideration of that time.

16. The 3rd claimant was employed on 1st August 2003 and was dismissed in January 2008. There was no contract of service issued to the 3rd claimant. The claim for the 3rd claimant is that he worked in excess of the allowed hours, he had no contract issued to him, he was terminated without notice, was not issued with a certificate of service and that he was unfairly dismissed contrary to the various provisions of the employment Act. The 3rd claimant is therefore seeking to be paid damages for unfair termination, notice pay, reinstatement, overtime payment, general damages together with costs and interest of the awarded sums. The claim is premised on the provisions of the Employment Act. That aside, the termination of the 3rd claimant was done before the coming into force of the Employment Act, 2007. He therefore falls under the terms and conditions as outlined in the repealed legislation, Cap 226.

17. The claimants have heavily relied on the provisions of the Constitution as under Article 159 with regard to the court not to rely on procedural technicalities and further sought to rely on the fact that the cause of action arose before the coming into force of the Employment Act, 2007. Whether there is a good basis for the claim or not, this is not what is under consideration in this ruling. That is a matter to be addressed at a full hearing.

In this case therefore, the objections with regard to the 2nd claimant's case must succeed whereas the objections to the 3rd claimant's claim must fail. The 2nd claimant case will therefore be struck off from the record for failing to meet the statutory requirements as set out under section 90 of the Employment Act. Parties to set a hearing date for the other claims.

Costs will be in the cause.

Delivered at Nairobi and dated this day of 18th December 2013

MBARU

JUDGE

In the presence of

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