



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1375 OF 2012

HILARION MWABOLO.....CLAIMANT

VS

KENYA COMMERCIAL BANK.....RESPONDENT

RULING

Introduction

1. This Ruling flows from the Preliminary Objection taken by the Respondent by way of notice dated 8th May 2013 and filed in Court on even date. The Respondent seeks dismissal of the Claimant's claim on the grounds that:

- a. The claim is statutorily time-barred and offends the provisions of Section 4(1) of the Limitations of Actions Act, Cap 22 Laws of Kenya.
- b. The claim offends the provisions of Section 90 of the Employment Act, 2007.
- c. The claim offends the provisions of Section 4(4) of the Trade Disputes Act, Cap 234 Laws of Kenya.
- d. The claim has been filed without leave of the Court six (6) years after the Claimant's termination.

The Respondent's Submissions

2. In its written submissions accompanying the notice of preliminary objection, the Respondent, through the Federation of Kenya Employers, submitted that a plea of limitation is a point of law to be determined *in limine*. The Court was referred to the well known case of *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA, 696* where Law JA stated that:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

3. The second issue raised in the preliminary objection taken by the Respondent is that the Claimant failed to comply with the provisions of Section 4(4) of the Trade Disputes Act (now repealed) which

required any trade dispute involving the termination of an employment contract to be reported to the Minister within twenty eight (28) days of the termination.

4. With regard to limitation, the Respondent submitted that since the Claimant's employment was terminated on 10th June 2006, his claim which was filed on 13th August 2012, without leave of the Court, was statute barred by dint of Section 4(1) of the Limitations of Actions Act.

The Claimant's Submissions

5. In the written submissions filed on behalf of the Claimant by the firm of Nyabena Nyakundi & Company Advocates, it was submitted that the objection by the Respondent does not meet the threshold for a preliminary objection since the facts of the case are disputed. With regard to the date when the cause of action arose, the Claimant submitted that the applicable date is 22nd May 2007 when the Respondent rejected the Claimant's appeal and upheld its decision to terminate his employment.

Ruling of the Court

6. Although reference was made to Section 90 of the Employment Act, 2007 it is not in dispute that by the time the Claimant's employment was terminated, this law had not come into effect and is not applicable to the case. In determining this matter, the Court will therefore restrict itself to the Limitations of Actions Act. Section 4(1) (a) of the Act provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. The only reprieve is granted under Sections 22, 26 and 27 which allow extension of the limitation period in cases of disability, fraud or mistake and ignorance of material facts.

7. As was held in the case of *Gathoni Vs Kenya Cooperative Creameries Ltd. [1982] 2 KLR 104:*

“The law on limitations of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

8. None of the conditions for extension of time set out in Cap 22 have been established by the Claimant in this case and the Court did not find any evidence of the Claimant having taken reasonable steps in his interest. The Court further noted that the Claimant's claim is brought under the Employment Act, 2007 which as I have already found, was not in operation when the cause of action arose., thus making a *prima facie* case in favour of the Claimant doubtful.

9. Counsel for the Claimant advanced the argument that the cause of action did not accrue until his appeal against the termination of his employment was considered and declined, making the accrual date 22nd May 2007 rather than 10th June 2006. This argument begs the question when a termination of employment takes effect. In my view, termination kicks in from the date stated in the letter of termination. In this case, although the Claimant's termination letter was not produced, the Claimant stated in his own Memorandum of Claim that his employment was terminated on 10th June 2006 and the Court adopted this date as the effective date of the termination of employment and consequently as the accrual date. I therefore find that by the time the Claimant filed his claim on 13th August 2012, the six (6) year limitation period had lapsed and since no leave for extension of time was sought and none of the grounds for extension were established, I have arrived at the conclusion that the Claimant's claim is fatally defective and is dismissed with no order for costs.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF DECEMBER 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*