



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1418 of 2010

Charles Kiruthi Mwangi

CLAIMANT

and

G4S Security Services (K) Ltd

RESPONDENT

RULING

Background

1 Charles Kariuki filed this Claim against G4S Security Services (K) Ltd on 15 November 2010. The Claimant, it appears from the pleadings was employed by the Respondent with effect from 6 June 1973 and his services were terminated on 27 April 2006 through a letter of same date.

2 The Respondent having been served filed a Memorandum of Reply on 30 June 2012 and in its Reply, it raised a preliminary point of law to the effect that the Claim was time barred by virtue of Section 90 of the Employment Act.

3 The parties agreed that the preliminary objection be determined on the basis of written submissions. Respondents written submissions were filed on 27 September 2012. The Claimant was directed to file his submissions on or before 19 October 2012. At the time of this ruling I had not been furnished by the Claimant's submissions.

Respondent's submissions

4 It is the submission of the Respondent that the Claim is time barred by virtue of Section 90 of the Employment Act, 2007 which provides:

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based on 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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof.

5 It is the contention of the Respondent that the above section is couched in mandatory terms and that because the Claimant's services were terminated on 27 April 2006, he was under a statutory obligation to bring his action on or before 27 April 2009.

6 The Respondent/Objector placed reliance on 2 authorities Industrial Cause No.27 N of 2010, *Kenya Scientific Research International & Allied Institutions Workers Union v TNS Research International Ltd* and *Langat v Kenya Posts & Telecommunications Corporation* (2000) 1EA 147 (CAK) and 3 other cases which were not supplied to the Court. I will address these authorities towards the end of

this decision.

Evaluation

7 The law applicable at the time of the termination of the Claimant's services was the Employment Act, Cap 226. This law was repealed by the Employment Act, 2007.

8 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.

9 My reading of the Employment Act 2007 has not found any provision in the Act which states that it shall have 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.

10 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. At the time the contract of service in contention was terminated, the Employment Act, 2007 was not in place.

11 In answering the question it should be noted that the employment/contractual relationship had ended in 2006 before the commencement of the Employment Act, 2007. In this regard the continuance, application and interpretation of the contract in accordance to the provisions of the Employment Act, 2007 in case of inconsistency does not arise.

12 Any disputes on limitation from such contract must be determined on the basis of the repealed Employment Act, Cap. 226 and the Limitation of Actions Act.

13 That leaves a consideration of the Limitation of Actions Act and section 4 thereof is relevant. The section provides:

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;

14 It cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's services were terminated on 27 April 2006. Six years from the date of his termination would have expired on 26 April 2012. Before the commencement of the Employment Act, 2007, the Claimant would have been acting on sound legal footing that the expiry period for him to initiate a claim for breach of the contract of service was on or before 26 April 2012. The Limitation of Actions Act gave him that assurance.

15 And was it the intention of the legislature in section 90 of the Employment Act, 2007 to take away that assurance? I don't think so. I say so on the basis of the decision of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* (1982) 3 All ER 833, that such interpretation would be depriving and impairing the Claimant of his accrued cause of action/right. This is because such a construction would inflict a detriment upon persons in the position of the Claimant while conferring a benefit upon the Respondent, which benefit has put the Claimant in a disadvantage. It would also not be fair.

16 I express my approval as the correct legal position the holding in *Philips v Eyre* (1870) LR QB 1 which was cited with approval by Nyamu J. in *Keroche Industries Ltd v Kenya Revenue Authority & 5 others* (2007) eKLR that:

Retrospective laws are no doubt prima facie of questionable policy, and contrary to the general principle

that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law: Accordingly the Court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature.

17 Section 4(1) of the Limitation of Actions Act amended by section 90 of the Employment Act 2007 is not merely procedural but substantive provision. It affects rights which persons such as the Claimant enjoyed. It is a general presumption at common law and rule of statutory interpretation that statutes should not be interpreted to operate retrospectively unless there is express intention by the legislature. I take umbrage for this position in the *per curiam* holding in the *Yew Tew Bon* case (supra).

18 In this regard the Interpretation and General Provisions Act, Cap 2 is also material. The Act in Section 23 provide:

(1) Where in a written law a reference is made to another written law, that reference shall, except where the context otherwise requires, be deemed to include a reference to the last-mentioned written law as it may from time to time be amended.

(2) Where a written law repeals and re-enacts, with or without modification, a provision of a former written law, references in another written law to the provisions so repealed shall, unless a contrary intention appears, be construed as references to the provision so re-enacted.

(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or....

19 Having looked at the above cited authorities, statutory provisions and the submissions on record, it is my considered opinion that it is only contracts of service terminated after the commencement of the Employment Act, 2007 which must be brought to Court within three years as expressed in section 90.

20 In my humble opinion I do not agree with the holding of Justice Rika in *Kenya Scientific Research International & Allied Workers Union v T N S Research International Ltd, Industrial Court Cause No. 27(N) of 2010 that contracts ranging between 1999 – 2005 were time barred and that the Court has no mandate to enforce rights accrued outside the time limits set under section 90. Such contracts remain to determined under the repealed Employment Act, Cap 226, if they were brought within the time allowed for under the Limitation of Actions Act.*

21 Of course in such cases, it is not open to the Court to award remedies which were not allowed by statute such as 12 months compensation for unfair termination which was introduced by the Employment Act, 2007.

22 The other case relied on by the Respondent, *Langat v Kenya Posts & Telecommunications* (2000) 1EA 147 (CAK) is not relevant in the present case as it was decided on the basis of a limitation period set out in the Kenya Posts and Telecommunications Act, Cap 411. The Respondent relied on 2 other authorities which were not supplied to the Court.

Conclusion

23 The upshot of the foregoing is that the Preliminary objection is dismissed with no order as to costs.

Dated and delivered in open Court in Nairobi on this 26th day of October 2012.

Justice Radido Stephen

Judge of the Industrial Court

Appearances

Mr. Mutahi instructed by K. Macharia & Co For Claimant/Respondent

Ms. Kirimi instructed by Hamilton Harrison & Mathews

Advocates For Respondent/Objector