



**JOAN INDOSIO BLASTO..... CLAIMANT**

**VS.**

**GIL OIL COMPANY LIMITED.....RESPONDENT**

### **RULING**

When this matter came for hearing, Mr. Masese for the responded raised a preliminary objection to the claim which he informed the court was embodied in his memorandum of reply and submissions. The objection touched on the issue of limitation and the jurisdiction of this court to hear the claimant.

On the issue of limitation, counsel grounded his submission on section 90 of the Employment Act 2007 arguing that the claimant having been summarily dismissed on 30<sup>th</sup> April, 2004 could not validly bring the present claim since the afore-cited section bars the filing of any suit outside of three years after the accrual of cause of action.

On the issue of jurisdiction, counsel submitted that the cause of action having accrued prior to the enactment of the Employment Act, 2007, the operating legislation was the repealed Employment Act (cap 226) which conferred jurisdiction on the Magistrates Court. Counsel further submitted that section 4(d) of Schedule 5 to Labour Relations Act is clear that any act or cause of action that accrued before the coming into force of the Act was to be dealt with in accordance with Trade Disputes Act [cap 234] (now repealed).

Mr. Odawa for the claimant in resisting the preliminary objection submitted that summary dismissal did not take place on 30<sup>th</sup> April, 2004 as alleged. According to him there was no termination at all. Counsel contended that the cause of action accrued when the claimant was acquitted of criminal charges she was facing in 2008 hence she was within time by the time the action was filed. It was his contention that the claimant neither resigned nor has been dismissed and could as well still consider herself an employee of the respondent.

Issues of limitation and jurisdiction are fundamental to any action and if successfully raised are fatal to any litigation. In the famous case of **Mukasa Biscuit Manufacturing Company Co. Ltd v West End Distributors Ltd [1969] EA 696**, Law JA as he then was had this to say concerning preliminary objection:

“...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, 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...”

The essence of limitation is grounded on the maxim that “equity aids the vigilant not the indolent”. What this implies is that a party who is wronged must proceed diligently to agitate for his or her claim. The logic becomes readily appreciated when one considers that no public interest and indeed the interest of justice is served by letting a defendant to live in fear that a claim may one day be lodged against him or

her even long after the event complained of and memories rendered dim through passage of time. In short there must be an end to litigation.

On the question of jurisdiction, a court that entertains a matter in respect of which it has no jurisdiction is not only a busy body but erodes its authority by trying issues it lacks the competence to try. In the case of **The Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya)Ltd [1989 KLR 1** at pp. 14-15, Nyarangi J stated: “Jurisdiction is everything, without it, a court has no power to proceed.

The questions for me to decide therefore are mainly two. First and foremost do I have jurisdiction to hear this matter? Second is the claimant’s claim barred by dint of section 90 of the Employment Act 2011?

To answer the question concerning jurisdiction, I have considered submissions by counsel for the respondent and looked up the various provisions of the law that are relied on in support of his submissions

The preamble to Labour Relations Act, 2007 provides as follows:

An Act of Parliament to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratisation of trade unions and employers organisations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes.

Section 2 of the Act defines a trade dispute as follows:

“trade dispute” means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers’ organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union;

Section 73 of the same Act provides that a trade dispute may only be referred to the Industrial Court by the authorized representative of an employer, group of employers’ organization or trade union.

The sum total of these provisions which I have attempted to reproduce demonstrate that a trade disputes may only be referred to the Minister or the Court as stipulated in the Act by Trade Union or their authorized representative. Although the cadre of the claimant was within unionizable employee parameters, I did not have the benefit of any submission to the effect that the claimant belonged to any Union. The Court therefore assumes that the claimant did not belong to any with the sum effect that she could not possibly benefit from either the provisions of the repealed Trade Disputes Act or the Labour Relations Act, 2007.

Having so found, does the claimant still have a right of audience before this court or is it that she ought to have pursued her claim in the Magistrates Court as contended by counsel for the respondent?

Section 12 of the Industrial Court Act provides:

12. (1) 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 to the Court relating to employment and labour relations including—

trade union;

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

- (b) disputes between an employer and a trade union;
- (c) disputes between an employers' organisation and a trade unions organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organizations;
- (f) disputes between an employers' organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j)disputes relating to the registration and enforcement of collective agreements.

The dispute before me is between an employee and a former employer I therefore find that the Court has jurisdiction to hear the claimant's claim. The contention by the respondent's counsel that the claimant ought to have filed her claim in the Magistrate's Court as per the repealed Employment Act is hereby rejected.

The Court has noted that the termination letter which the respondent's relies on as the effective date when the claimant's services got terminated is addressed to her through the respondent's postal address. Further, there is neither proof by affidavit nor additional evidence that the letter was ever received by the claimant. The question as to the manner and the time of termination of the claimant's services is at the crux of this suit and can only be delved into at the full trial where relevant evidence will be adduced.

In conclusion the Court finds no merit in the preliminary objection raised by the respondent and it is hereby disallowed. The Court therefore directs that the case proceeds to full trial at a date to be fixed in the Registry.

**Dated at Nairobi this 18TH day of OCTOBER 2012**

**Jo Abuodha**

**Judge.**

Delivered in open Court this 18th day of October 2012

..... For Claimant

..... For respondent