



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 374 of 2011

DANIEL SONGA

SILA.....CLAIMANT

VS

PROPERTY DEVELOPMENT & MANAGEMENT LTD.....RESPONDENT

RULING

M/S Okole for Respondent/Objector

M/S Muendo for Claimant

The Claimant herein has brought a suit against the Respondent his former employer on 14th March, 2011 claiming *inter alia*:-

1. a declaration that his termination from employment by the Respondent was unlawful and unfair;
2. compensation and payment of damages for the unlawful and unfair termination;
3. payment of unpaid salary for a period of 38 months between 10th August, 2006 and October, 2012 and accrued leave days for the period;
4. severance pay for the 13 years worked at the rate of 15 days for every completed year of service.

The total claim is for Kenya Shillings 866,190.00.

The Respondent through M/S Kairu & McCourt, Advocates filed a response to the suit on 28th March, 2011 alleging that the claimant's employment was lawfully terminated on 10th August, 2006 for involving himself in fraudulent activities and forgery as well as aiding and abetting the commission of the alleged offences.

That the Claimant was arrested and charged with the offence of forgery in Criminal Case No. 1472 of 2006.

It is common cause that the trial of the Claimant did not end until 17th July 2009, when the Court acquitted the Claimant of all charges leveled against him. He was however, out on bond during the trial.

The Respondent alleges that the Claimant was lawfully and fairly dismissed and therefore the suit should be dismissed in its entirety with costs.

By a notice of Preliminary Objection filed on 5th October, 2012 the Respondent raises objection in *limine* to wit; That the suit herein is time barred and contravenes Section 90 of the Employment Act, 2007.

The Section reads:-

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three (3) years next after the act, neglect or in the default complained or in the case of continuing injury or damage within twelve (12) months next after the cessation thereof”.

From the outset, the Court notes that the Employment Act, 2007 was enacted after the Claimant herein had been dismissed, it being not in dispute that his employment was terminated on 10th August, 2006. At the time, the Contract of Employment of the Claimant was governed by the Employment Act, Cap.226 repealed by Section 92(1) without savings. However in terms of Section 93(1), the Contracts of Service entered into in accordance with the repealed Act would continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of the 2007, Act.

It follows that the Employment Act, 2007 was not meant to operate retroactively and is not applicable to contracts of employment that had been terminated before its enactment and operationalization.

The Employment Act, Cap.226 (repealed) did not have a Limitation clause. As I stated in the Industrial Court of Kenya Cause No.1075 of 2010, in the absence of such a Limitation Clause, then this dispute is governed by the Limitation of Actions Act, Cap.22 of the Laws of Kenya.

Section 4(1) thereof provides:-

“the following actions may not be brought after the end of six (6) years from the date on which the cause of action accrued:-

- (a) Actions founded on contract may not be brought after the end of six (6) years from the date on which the cause of action accrued.*
- (b) Actions to recover a sum recoverable by virtue of a written law, other than a penalty of forfeiture.*
- (c) Actions including relief for which no other period of Limitations is provided by this Act or by any other written law.”*

These provisions cover all the claims in this suit as they are either founded on contract or are recoverable by virtue of a written law.

This being the case, the Limitation period applicable to the suit is six (6) years from the date on which the cause of action arose.

Accordingly, the objection in *limine* has no merit, same is dismissed with costs.

The suit will proceed to full hearing.

It is so ordered.

DATED and DELIVERED at Nairobi this 21st day of November, 2012.

Mathews N. Nduma

PRINCIPAL JUDGE